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In The

Supreme Court of the United States

OCTOBER TERM, 1974

No. 75-27

ABRAHAM GRUNIN,

Petitioner,

v.

INTERNATIONAL HOUSE OF PANCAKES
a division of
INTERNATIONAL INDUSTRIES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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TABLE OF CONTENTS

Page

Opinions Below 2

Jurisdiction 2

Questions Presented 2

Constitutional and Statutory Provisions Involved 4

Statement of the Case 5

Reasons for Granting Writ 8

1. The Decision of the Court of Appeals, That the Class Action Settlement Notice Satisfied Due Process Requirements of the Fifth Amendment and Rule 23(e) As to Time and Content, Conflicts with Decisions of the Supreme Court and Other Courts of Appeals 8

2. The Court of Appeals Erroneously Binds Petitioner and Other Franchisees by Res Judicata to Cooperate with Respondent in Continuing Violations of the Sherman Anti-Trust Act, 15 U.S.C. §§ 1 and 2 13

3. The Supreme Court Has Not Yet Addressed Itself to the Question of Whether "Coercion" Is An Element of Proof in a Private, Injunctive and Treble Damage Class Suit Where Unlawful Ties in a Franchise Industry Are at Issue, Although There Are Conflicting District Court and Court of Appeals Decisions 18

4. The Trial Court Exceeded Its Power and Violated Petitioner's and Other Franchisees' Freedom of Contract-Right As Protected by the Due Process Clause of the Fifth Amendment by Its Ipso Facto Reformation of the Franchise Agreements, Without Prior Individual Consent 21

Page

5. Legal Ethics and Public Policy Preclude, and the Conscience Is Shocked by, an A Priori Written Stipulation in a Class Action Settlement Agreement As to the Amount and Mechanics of Distribution of Legal Fees to be Paid to Plaintiffs' Attorneys Upon Its Approval by the Court 25

Conclusion 28

Appendix

Cases: Page

Airline Stewards v. American Airlines, Inc., 455 F.2d 101 (7th Cir. 1972) 12

Armstrong Cork Co. v. Lyons, 366 F.2d 206 (8th Cir. 1966) 24

Central Specialties Co. v. Schaefer, 318 F.Supp. 855 (N.D. Ill. 1970) 24

Chock Full O'Nuts Corp., Trade Reg. Rep., ¶ 20,441 (F.T.C. 1973) 16, 17

City of Detroit v. Grinnell Corp., 495 F.2d 448, (2nd Cir. 1974) 25

Eisen v. Carlisle & Jacquelin, 417 U.S. 134 (1974) 8, 11, 12

Federal Trade Commission v. Texaco, Inc., 393 U.S. 223 (1968) 18, 19

Freeman v. Ryan, 408 F.2d 1204 (D.C. Cir. 1968) 25

Greenfield v. Villager Industries, 483 F.2d 824 (3rd Cir. 1973) 8, 10, 11, 13

Hedges v. Dixon County, 150 U.S. 182 (1893) 24

In Re International House of Pancakes Franchise Litigation, 1973-2 Trade Cases ¶ 74,616 (W.D. Mo.), aff'd. 487 F.2d 303 (8th Cir. 1973) 2

International Salt Co. v. United States, 332 U.S. 392 (1947) 16

Kugler v. AAMCO Transmissions, Inc., 460 F.2d 1214 (8th Cir. 1972) 17

Lamb v. United Security Co., 59 F.R.D. 25 (S.D. Iowa 1972) 12

Manufacturers' Finance Co. v. McKey, 294 U.S. 442 (1935) 24

Milone v. English, 306 F.2d 814, (D.C. Cir. 1962) 25

Milstein v. Werner, 57 F.R.D. 515 (S.D. N.Y. 1972) 8, 9, 12

Page

Milwaukee Towne Corp. v. Loew's, Inc., 190 F.2d 561 (7th Cir. 1951), cert. denied, 342 U.S. 909 (1952) 25, 26

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 8, 11, 13

Northern Pacific Ry. Co. v. United States, 356 U.S. 1 (1958) 14, 15

Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968) 19

Siegal v. Chicken Delight, Inc., 448 F.2d 43 (9th Cir. 1971), cert. denied, 405 U.S. 955 (1972) 15, 16, 17

Sprague v. Ticonic National Bank, 307 U.S. 161 (1939) 26

State of Illinois v. Harper & Row Publishers, Inc., 55 F.R.D. 221 (N.D. Ill. 1972) 26

Steffen v. United States, 213 F.2d 266 (6th Cir. 1954) 24

Susser v. Carvel Corp., 332 F.2d 505 (2nd Cir. 1964), cert. denied, 381 U.S. 125 (1965) 17

Sylvan Beach v. Koch, 140 F.2d 852 (8th Cir. 1944) 23

Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953) 15

Trustees v. Greenough, 105 U.S. 527, 26 L.Ed 1157 (1881) 25

Ungar v. Dunkin' Donuts, Trade Reg. Rep., ¶ 60,361 (E.D. Pa. 1975) 17, 18, 19, 21

United States v. Loew's, Inc., 371 U.S. 38 (1962) 15

United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948) 15

United Transportation Union v. State Bar of Michigan, 401 U.S. 581 (1971) 24

Page

Windsor v. McVeigh, 93 U.S. 274, 23 L.Ed. 914 (1874) 24

United States Constitution:

Amendment V 4

Statutes:

Clayton Anti-Trust Act:
15 U.S.C. § 14 ..... 4, 23, 24
15 U.S.C. § 15 ..... 5, 24
15 U.S.C. § 26 ..... 5, 24

Federal Rules of Civil Procedure:
Rule 23(e) 5, 8, 9

Judiciary and Judicial Procedure:
28 U.S.C. § 1254(1) 2

Sherman Anti-Trust Act:
15 U.S.C. § 1 ..... 3, 4, 13, 18, 23, 24
15 U.S.C. § 2 ..... 3, 4, 13, 18, 23, 24

Procedural Manual:

Manual for Complex Litigation 27

Secondary Material:

Code of Professional Responsibility
Canon 5 26

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Abraham Grunin, Petitioner, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on March 17, 1975, which affirmed a Judgment of the United States District Court for the Western District of Missouri* on November 29, 1973.

* Because of the extraordinary length of the settlement agreement, its full exposition is not set forth herein but may be found in "Joint Appendix, Volume I" at 438-556 filed herein.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Eighth Circuit is reported at 513 F.2d 114 (A-1). The Judgment approving the Class Settlement Agreement, out of which this Petition arises, was without opinion, and therefore is not reported (A-31). A prior opinion of the United States Court of Appeals for the Eighth Circuit in this same litigation affirming a judgment by the United States District Court for the Western District of Missouri rejecting a prior, almost identical class action settlement is reported at 487 F.2d 303 (A-40), and the opinion of the United States District Court rejecting the same settlement agreement is reported in 1973-72 Trade Cases, ¶ 74,616 (A-43).

JURISDICTION

On March 17, 1975, the Court of Appeals entered its Judgment (A-28) and on April 8, 1975, it entered its Order Overruling Petitioner's Motion for Rehearing (A-30). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

(1) Whether the allowance of nine (9) days to object to a proposed class action settlement fulfills the due process requirement that an interested party be afforded a reasonable time rationally to decide whether to appear and object, default or otherwise make his views known.

(2) Whether a class action settlement agreement which requires that the franchisees of a fast food franchise chain, in order to retain their franchises, purchase their flour and ac-

counting services and lease their restaurant equipment from the franchisor, *per se* violates the Sherman Anti-Trust Act, 15 U.S.C. §§ 1 and 2.

(3) Whether interposition by a franchisor as its primary defense to a class action suit for treble damages and injunctive relief that it practiced no individual coercion to induce its franchisees to lease from franchisor their restaurant equipment, precludes a finding of *per se* illegal tying arrangements proscribed by the Sherman Anti-Trust Act, 15 U.S.C. §§ 1 and 2.

(4) Under the guise of approving settlement of a class action brought for recovery of treble damages and injunctive relief, did the trial court exceed its judicial power by disregarding the Complaints on file and Notice of Class Action Designation and entering a judgment materially and substantively reforming the franchise contract documents without first obtaining the consent of each class member affected thereby?

(5) Whether written stipulations in the class action settlement agreement that One Million Two Hundred Fifty Thousand Dollars ($1,250,000.00) was a just and reasonable fee to be paid to class plaintiffs' attorneys and as to the manner in which such sum was to have been paid created such an appearance of conflict of interest that the motives of counsel who negotiated and proposed such settlement for approval might be called into question and such doubt cast upon the traditionally sacred relationship of attorney-client that the entire class settlement should be invalidated as contrary to public policy.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States:

Amendment V.
"No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

Statutes:

Sherman Anti-Trust Act.

15 U.S.C. § 1.

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is hereby declared to be illegal . . ."

15 U.S.C. § 2.

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony . . ."

Clayton Anti-Trust Act.

15 U.S.C. § 14.

"Section 3. It shall be unlawful for any person engaged in commerce . . . to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities . . . on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

15 U.S.C. § 15.

"Section 4. Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any District Court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

15 U.S.C. § 26.

"Section 16. Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the anti-trust laws . . ."

Rule 23(e), Federal Rules of Civil Procedure.

"A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."

STATEMENT OF THE CASE

Prior to 1968, when the first of the suits was filed, which ultimately gave birth to the class action multi-district litigation out of which this Petition arises, the printed, standard, fifteen-year franchise agreements of International House of Pancakes (IHOP), a fast food franchisor, required its restaurant franchisees to: (1) lease from IHOP all of their furniture, fixtures and equipment for not less than fifteen years; (2) buy from IHOP all of their dry mixes at fixed prices; (3) buy all of their paper products from IHOP at its fixed prices; (4) place all their insurance through IHOP; (5) place all of their advertising through IHOP; (6) purchase all accounting services from IHOP; (7) lease their land and building from IHOP. In addition, and

for the privilege of obtaining the license to use the IHOP name, trade-mark and logos, they paid upwards of $45,000.00 (R.A. 73-90).[1]

On October 26, 1971 the trial court entered its Class Action Order creating a Class composed of those franchisees who were then operating franchised restaurants and a second class composed of former franchisees who no longer were operating IHOP restaurants (R.A. 125-127). On November 19, 1971, the court notified all those interested of the pendency of "actions for treble damages and injunctive relief for alleged violations of anti-trust laws of the United States" (R.D. 8).[2]

A first proposed settlement agreement in the class actions was heard by the Court on June 1st and 2nd, 1973, following certified mail notices sent to class members on April 27, 1973, (R.A. 128-136). The notices contained the advice, among other things, that Plaintiffs' counsel would file a petition for allowance of aggregate counsel fees in the amount of $1,110,000.00 (R.A. 128). To each mailed notice was appended a complete copy of the proposed settlement agreement, which subsequently was disapproved by the Court on July 12, 1973 (A-43). IHOP's appeal from the disapproval was summarily rejected on November 2, 1973 (A-40).

On Friday afternoon, November 9, 1973, notice of a second, proposed settlement agreement of the class actions was mailed by the Clerk of Court, this time advising among other things, that $1,250,000.00 had been *set aside* as an aggregate sum for Plaintiffs' attorneys' legal fees (R.D. 28, R.A. 563-569). No

[1] "R.A." Citations are to pages of the printed Appendix filed in the Court below which is a part of the certified record filed in this cause.

[2] "R.D." Citations are to pages of the docket entries filed in the Court below which are part of the certified record in this cause.

copies of the second, proposed settlement agreement were attached to the November 9, 1973, notices, which also directed that a hearing on the settlement agreement would be held before the Court on November 28th and that all those who wished to appear in opposition to the proposal were to have notices of appearance on file with the Court no later than November 23rd (R.A. 560-569).

Petitioner appeared and vociferously objected to the settlement agreement during the court hearing which took place on November 28th and 29th, and although neither monetary damages nor injunctive relief was granted to the major class of current franchisees, the court approved the settlement on November 29th (A-31).

Immediately upon declaring its approval of the settlement agreement from the bench, the Court launched upon a hearing of testimony on the several applications for legal fees that had been filed, and on February 1, 1974, after Petitioner had filed his Notice of Appeal, it distributed the entire sum of $1,250,000.00 among all of the Plaintiffs' attorneys', but excluded a distribution to Petitioner's counsel (R.A. 1316-1324).

The settlement agreement approved by the trial court and the Court of Appeals provides neither injunctive relief against IHOP nor monetary damages to class members, treble or otherwise, as sought in the Complaints on file and as evidenced in the Notice of Designation of Class Action. On the contrary, it requires Petitioner and other franchisees in order to retain their franchises to purchase all of their dry mixes from IHOP; requires them to lease all of their restaurant equipment, furniture and

fixtures from IHOP; and requires them to pay for accounting services provided by IHOP whether desired or not (R.A. 502-503; 449-459; 485-487).

Petitioner, Abraham Grunin files this Petition for Certiorari to review the adverse decisions of the Courts below.

REASONS FOR GRANTING THE WRIT

1. THE DECISION OF THE COURT OF APPEALS, THAT THE CLASS ACTION NOTICE SATISFIED DUE PROCESS REQUIREMENTS OF THE FIFTH AMENDMENT AND RULE 23(e) AS TO TIME AND CONTENT, CONFLICTS WITH DECISIONS OF THE SUPREME COURT AND OTHER COURTS OF APPEALS.

Rule 23(e) requires that notice of a proposed dismissal or compromise of a class action be given to *all* members of the class. Rule 23 Notices must conform to the requirements of due process of law in order to fairly insure the protection of the interests of absent parties who are to be bound by the judgment. *See, e.g., Eisen v. Carlisle & Jacquelin,* 417 U.S. 134 (1974).

Notice of a proposed class action settlement "must afford a reasonable time for those interested to make their appearance." *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950). The Third Circuit Court of Appeals in synthesizing the language of this court in *Mullane* held that Rule 23 Notices to class members must "afford a reasonable time for those interested to choose whether to appear or default, acquiesce or contest." *Greenfield v. Villager Industries,* 483 F.2d 824, 834 (3rd Cir. 1973). *See also, Milstein v. Werner,* 57 F.R.D. 515 (S.D. N.Y. 1972).

In direct violation of the due process requirement that absent class members be afforded a reasonable time to choose whether to accept or contest a proposed class action settlement, the Court below held that the allowance of only nine (9) working days was sufficient for class members to retain counsel, obtain a copy of the copious agreement, read and digest its significance and "rationally decide whether they should intervene in the settlement proceedings or otherwise make their views known." *Milstein, supra,* at 518.

The Rule 23(e) Notice of the proposed settlement at bar, mailed at 4:00 P.M. on Friday, November 9th, comprised a seven (7) page summary of a 119 page settlement and stated that those who chose to object to the settlement agreement were to have filed a written appearance in the District Court at Kansas City on or before Friday, November 23, 1973 (R.D. 28; R.A. 560-569). The period between November 9 and November 23 included two weekends and the Thanksgiving holiday. Class members thus were allowed only nine (9) working days to make a decision, based upon an abbreviated summary of a complex settlement agreement, whether to contest it.[3] The nine day period was totally insufficient for class members, scattered as they are across the nation, to receive the notice by mail, study the proposal, acquire a copy of the settlement

[3] To add further confusion and create further time pressures, the Court issued a second notice to class members a week later, on Friday, November 16th, amending the November 9th notice and creating additional, specific decisions to be made, while exhorting and admonishing the class members to "act quickly as this opportunity will not be available after entry of judgment," presumptively November 28th. (R.D. 28; R.A. 575).

agreement by mail,[4] obtain independent counsel to evaluate the complex document,[5] rationally decide whether to travel to Kansas City to object to the settlement, formulate objections to the settlement, and file written notice of appearance by mail. The nine day period was patently unreasonable and as "fatal to due process as no notice at all." [6] *Greenfield, supra,* at 834.

The Court below opined that class members were not deprived of due process by reasoning that the length of time the litigation had been ongoing was "highly relevant" and that some of the class members were represented by personal counsel at a prior settlement hearing and accordingly the class had "continuing notice" sufficient to satisfy due process requirements, which is a completely novel and heretofore unespoused doctrine. Even assuming that counsel for some of the individual class members had been kept informed of the settlement negotiations, of which Petitioner denies knowledge, "continuing notice" to *some* members of the class provides no due process protection to the vast remainder of class members. This "continuing notice" theory is without precedent and if followed to its logical end leads to the conclusion that "no notice at all,

[4] The Court below held that "class members are not expected to rely upon the notices as a complete source of settlement information." (A-11).

[5] Since the settlement agreement stipulated that $1,250,000 was a fair and reasonable legal fee to be paid to class counsel and it was the same class counsel together with defense counsel who were recommending the agreement for approval, it is doubtful that class members would have been given information about the agreement with any degree of objectivity.

[6] The deprivation of due process practiced upon class members by the inadequacy of time is evidenced by the appearance of nine (9) class members as *amici curiae* in the Court below asserting that the period of time allowed by the notices was so short that they did not have an opportunity to make known to the trial court their objections to the settlement. (A-6).

published or otherwise, would be required in the present case." *Eisen, supra,* at 177. The unambiguous requirement of Rule 23(e) is that *"all members of the class" shall be given notice of a proposed compromise of a class action,* not just those with individual counsel, who had appeared at a prior hearing at which a settlement had been rejected. The decision of the Court below in approving a constitutionally inadequate notice procedure is in clear conflict with *Mullane, Eisen,* and *Greenfield.*

The notices also founder on the shoals of objectivity and neutrality in their abbreviated outline of the complicated, extraordinarily long and confusing settlement provisions. While exalting, for example, alleged "aggregate savings" to the class of between $12 Million and $20 Million and the benefits of equipment "ownership" under any one of four (4) option revisions to the equipment lease, it omits mention that all of the equipment is pledged to banks to secure IHOP's enormous indebtedness and therefore could not be sold, encumbered or removed without prior release of such indebtedness. The notice creates the spectre of defeat, while ignoring almost certain victory on issues relating to menu price-fixing; required purchases of insurance, accounting services and paper products from IHOP; admitted, clandestine "kick-backs" that IHOP had been taking for many years.

In short, the Notice was intended as a "selling job" to the franchisees[7] in furtherance of which it contains out-right mis-

[7] The notice argues as follows: "It is quite possible that a trial of this lawsuit will result in a judgment for defendant; and the franchisees will recover nothing and also lose the extensive benefits they would otherwise receive under the proposed settlement * * * [T]he proposed settlement provides immediate available relief to the franchisees which represents a very large part of the maximum relief they could hope to

representations of facts, misleading constructions of the contractual provisions, erroneous, self-serving legal conclusions, and it omits stating material facts which necessarily should have been disclosed so as to make the facts as stated true under the surrounding circumstances. Traditional fair play demands scrupulous neutrality in the presentation of the settlement agreement to class members so that their ultimate actions with regard to it are "rationally decided." *See, Airline Stewards v. American Airlines, Inc.*, 455 F.2d 101, 108 (7th Cir. 1972); *Milstein, supra,* at 518.

Finally, the record reveals that of the 310 class members, 109 did not even receive the notice. *Eisen* requires that notice must be sent to all class members "who can be identified through reasonable effort." While the notice was mailed to the last known addresses of class members, the record fails to indicate that any prior effort, reasonable or otherwise, was made to locate mis-addressed class members. Yet, after the settlement hearing, Liaison Counsel admitted locating additional class members. Under this Court's reasoning in *Eisen*, Rule 23 and procedural due process are not satisfied by the mere gesture of depositing notices in the mails to last known addresses. Furthermore, the trial court and counsel ignored the monitoring protection approved in *Lamb v. United Security Co.*, 59 F.R.D. 25, 42 (S.D. Iowa 1972), which requires that if a significant number of notices are not delivered, the court must revisit the

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footnote 7, continued

obtain in the event of complete and total victory. The immediacy and certainty of the relief afforded, in the opinion of counsel signatory hereto, far outweighs any possible extra benefits of trial and doubtful results" (R.A. 567).

matter "to determine if further notice" would be required. Certainly 109 out of 310 class members deprived of any notice whatsoever of the settlement is a significant number.

The class action "procedure can be tolerated, if not completely justified, only if there is a fealty to both the spirit and the letter of the procedural rules, especially those relating to notice." *Greenfield, supra,* at 831-832. There was fealty to neither the spirit nor the letter of the procedural rules relating to notice in this class action. Class members in the case at bar suffered in terms of notice time, notice content, and reasonable effort to locate class members. Notice was a mere gesture. In the words of this Honorable Court:

> "When notice is a person's due, process which is a mere gesture is not due process." *Mullane, supra,* at 315.

This Honorable Court should grant its writ to correct the deprivation of due process approved by the Court below and settle these important questions of constitutional safeguards in connection with the settlement of class actions.

2. THE COURT OF APPEALS ERRONEOUSLY BINDS PETITIONER AND OTHER FRANCHISEES BY *RES JUDICATA* TO COOPERATE WITH RESPONDENT IN CONTINUING VIOLATIONS OF THE SHERMAN ANTI-TRUST ACT, 15 U.S.C. §§ 1 AND 2.

The settlement agreement approved by the Courts below contains and perpetuates *per se* illegal tying arrangements proscribed by the Sherman Anti-Trust Act, 15 U.S.C. §§ 1 and 2. In approving this settlement agreement, they have embraced and approvingly given *res judicata* effect to an agreement

violative of the anti-trust statutes, even though this Court has forcefully condemned such agreements "because of their pernicious effect on competition and lack of any redeeming virtue." *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 5 (1958). This Court should grant its Writ in this cause to correct the lower court's error in having become the unwitting parties to an illegal agreement which "serve[s] hardly any purpose beyond the suppression of competition" and which ultimately results in economic loss to the general public as well as the franchisees.[8] *Northern Pacific, supra,* at 6.

The settlement agreement provides that to retain his license to use the IHOP name, trademark and method of business, the franchisee must purchase all of his pancake and waffle mix from Respondent,[9] must purchase his accounting services from

[8] The Trial Court recognized the impropriety of a court approving an illegal contract in its rejection of a prior, almost identical, proposed settlement of this cause.

> "If this court approved this proposed settlement, it would give judicial approval to the exact provisions of these franchise agreements, which plaintiffs have vigorously contended violated the anti-trust laws . . . . In addition, the members of the class would be bound, by judicial decree, to continue making these payments for the balance of a twenty-year lease (in most cases at least fifteen years), whereas, the franchisees who are not in the class would be free to seek injunctive relief against continued payments." (A-45).

Similarly, the Eighth Circuit Court in affirming the trial court recognized the same impropriety as follows:

> "In view of the fact that . . . it [the settlement] would continue in effect the very provisions of the franchise agreement challenged as violative of the anti-trust laws, we think Judge Collinson properly exercised his discretion in disapproving the settlement."(A-42).

Both Courts ignored their prior Opinions in approving this settlement which contains almost the same provisions as the prior proposed settlement.

[9] Though IHOP does not manufacture the mixes but merely designates a miller and provides the recipe to the miller, the settlement provides that the franchisees must purchase the mixes through IHOP at a price fixed by the settlement guaranteeing IHOP a "net profit" of 50% on all mixes sold (R.A. 502).

Respondent,[10] and must lease or purchase all of his restaurant equipment from Respondent (R.A. 438-556). Prior to the settlement agreement, each of these requirements was a condition to the franchisee's original purchase of the franchise license and was embodied in the standard, printed form franchise agreements which the record shows were never varied. These agreements from their inception and as continued and perpetuated by the settlement agreement contain all three of the elements, which together give rise to *per se* Sherman Anti-Trust violation.

First, there is a tied product which must be purchased in order to purchase and retain the tying product. Here the franchisees are required to purchase mixes, accounting services, and restaurant equipment, among other things, (tied products) as a condition of being allowed to purchase and retain the franchise license (tying product). Hence, the two-product test is satisfied. *See, Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 613-614 (1953).

Second, the tying product (license to use the IHOP trademark) possesses sufficient economic power to restrain competition in the tied product market. *Northern Pacific, supra*, at 6. When the tying product is patented, copyrighted, or a trademark, economic power is to be presumed. *United States v. Loew's, Inc.*, 371 U.S. 38, 45 (1962); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948); *Siegal v. Chicken Delight, Inc.*, 448 F.2d 43, 50 (9th Cir. 1971), *cert.*

[10]The settlement agreement continues unchanged in duration and amount the requirement that class members pay 5.2% or 6.2% of their gross receipts for accounting and management services, amounting to approximately $25,000 per year for each franchisee. (R.A. 756).

denied, 405 U.S. 955 (1972). Since the IHOP franchise license embodies a trademark, economic power must be presumed.

Finally, a "not insubstantial" amount of commerce must be affected by the agreement. *International Salt Co. v. United States*, 332 U.S. 392 (1947). The Respondent has conceded that this requirement is satisfied in this case.

While the decision in the Eighth Circuit below recognizes that the Court ought not "lend its approval to any contract or agreement that violates the anti-trust laws", it holds that the terms of the settlement agreement were not violations of the anti-trust laws *per se*, on the illogical ground that "the issue of illegality was vigorously contested by the parties." (A-16). The Court, however, makes no analysis of the meritoriousness of the Respondent's contest of the illegality of the settlement agreement, merely being satisfied to conclude that because Respondent did not admit to the illegality of the settlement agreement, such illegality was not a legal certainty. (A-16).

The only "defenses" to the *per se* illegality of the settlement agreement (and *a fortiori* to the franchise agreements) raised by Respondent were (1) that the two-product test was not satisfied as to the equipment, mixes and accounting services due to their inseparability from the franchise license and (2) the franchisees were not "coerced" to lease their equipment from the franchisor, since it was merely "offered" to them (and coincidentally "accepted" by all of them). *Siegal v. Chicken Delight*, *supra*, at 49 and *Chock Full O'Nuts Corp.*, Trade Reg. Rep., ¶ 20,441 (F.T.C. 1973) have studied, discussed and rejected the raised "defense" of two-product deficiency as far as

the equipment and dry flour mixes are concerned, and if the hoary doctrine of *stare decisis* has any significance in our jurisprudence, such defense was not worthy of comment, much less the dignity of a rationale upon which the Court of Appeals excused patent anti-trust violations. Insofar as the "coercion" defense is concerned, there has been a divergency of opinion in the lower courts. Because of its importance, Petitioner makes a more detailed analysis of the defense, *infra*.

To justify Respondent's allegation that the "two-product" test for illegality was not satisfied, the Eighth Circuit relied on its own opinion in *Kugler v. AAMCO Transmissions, Inc.*, 460 F.2d 1214 (8th Cir. 1972), which runs contra to all other Courts of Appeals as well as the Federal Trade Commission which have held that "sale of a franchise license, with the attendant rights to operate a business in the prescribed manner and to benefit from the good will of the trade-name, in no way requires the forced sale by the franchisor of some or all of the component articles." *Siegal, supra*, at 49; *see, also, e.g., Susser v. Carvel Corp.*, 322 F.2d 505 (2d Cir. 1964), *cert. denied*, 381 U.S. 125 (1965); *Chock Full O'Nuts Corp., supra*. At the very least the *AAMCO* opinion is distinguishable since it was restricted to advertising service, such services being "inextricable from the trade-mark, franchise system and logo as it is the major vehicle for promoting them." *Ungar v. Dunkin' Donuts*, Trade Reg. Rep., ¶ 60,204, at 65,745-46 (E.D. Pa. 1975). Advertising services excepted, the applicable decisions of the courts uniformly hold that the two-product test is satisfied when the availability of a franchise license is conditioned

upon the purchase of other tied items and services from the franchisor.

The settlement agreement approved by the Courts below thus clearly contains *per se* illegal tying arrangements proscribed by §§ 1 and 2 of the Sherman Anti-Trust Act, and the defensive theory advanced by the Respondent that the "two-product" test is not satisfied is wholly without merit as a matter of law, and the court approved settlement erroneously binds Petitioner and other franchisees by *res judicata* to engage in continuing anti-trust violations.

3. THE SUPREME COURT HAS NOT YET ADDRESSED ITSELF TO THE QUESTION OF WHETHER "COERCION" IS AN ELEMENT OF PROOF IN A PRIVATE, INJUNCTIVE AND TREBLE DAMAGE CLASS SUIT WHERE UNLAWFUL TIES IN A FRANCHISE INDUSTRY ARE AT ISSUE, ALTHOUGH THERE ARE CONFLICTING DISTRICT COURT AND COURT OF APPEALS DECISIONS.

In holding that the "alleged illegality of the settlement agreement is not a legal certainty," the Eighth Circuit Court relied on the contention of Respondent that the franchisees were not "coerced" into agreeing to lease their equipment from Respondent and accordingly no illegal tie-in existed. This Honorable Court, however, "has not set forth a coercion requirement in the tying cases." *Ungar, supra,* at 65,752. In his comprehensive analysis of the relevant case law, Judge Becker recently rejected "the doctrine that individual coercion must be proved in order to establish an unlawful tie," relying principally on his interpretation of this Court's decision in *Federal Trade Com-*

mission v. Texaco, Inc., 393 U.S. 223 (1968) and *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968). Judge Becker reasoned that this Court's decisions require only a showing that economic power was used in the tying transaction. *Ungar, supra,* at 65,764. This use of economic power may be established as follows:

> "[1] By proof of a resolutely enforced company policy to persuade or influence franchisees to buy only from the franchisor or its designated sources, particularly (but in any event) where there is an unequal bargaining relationship between the parties, or
> "[2] by proof that large numbers of franchisees have accepted a burdensome or uneconomic tie." *Ungar, supra,* at 65,766."

The required use of economic power is established as a matter of law in this case, because the undisputed facts prove both of the above described factual situations. First, Respondent had a "resolutely enforced company policy to persuade or influence franchisees to buy only from the franchisor" as admitted by Al Lapin, Jr., President and Chairman of the Board of Respondent, as follows:

> "The franchise package was organized, in its totality, sublease the building, to rent the equipment, to adhere to the standard operating procedures in every way. Part of that was that he was going to lease the equipment from the parent company" (Deposition of Al Lapin, p. 97).

In an address to a meeting of security analysts, Lapin admitted that IHOP "turns away prospective franchisees who have the money for a franchise but lack the willingness to do the job the International Industries, Inc. way" (R.A. 121). Lapin further described to the analysts the "*four* areas of separate

recurring sources of revenue and profit to International" as follows:

> "The *first* is an override which we receive on the sublease of the restaurant building to the franchisee . . . .
>
> "Our *second* revenue source is in the leasing of all the trade fixtures and equipment.
>
> "The *third* area of recurring profit comes from quantity discounts on all franchise food purchases, direct sales of paper goods, chinaware and IHOP trademark items.
>
> "The *fourth* recurring source of profit is the service charge the franchisee pays to the company" (R.A. 123).

It thus was a studied, resolutely enforced policy for IHOP to "influence" franchisees to lease their equipment from the Respondent and "turn away prospective franchisees" who refused. Clearly there was an unequal bargaining relationship between the parties, since the prospective franchisee was an individual interested primarily in the IHOP trade-mark and method of operation while the Respondent-Franchisor was a multi-million dollar corporation holding the rights to the trade-mark. The first alternative method of proving the requisite economic power used in the tying transaction is demonstrated in the record as a matter of law.

The second method of proving the use of economic power is also satisfied in this case, since it is undisputed that "large numbers of franchisees accepted a burdensome or uneconomic tie." There are 310 class members all of whom accepted the tying of the equipment lease to the franchise license. It is further undisputed that the equipment lease is a burdensome and uneconomic tie, because a typical franchisee is required to pay a total of $241,200.00 in equipment lease payments over a

twenty-five year period for equipment which cost the franchisor in 1966 only $40,000.00 (R.A. 123 & 852).

The requirement that economic power be used in the tying transaction is thus satisfied as a matter of law under the undisputed facts of this case. The illegality *per se* of the settlement agreement cannot be disputed on the basis of an alleged absence of coercion. The relevant question is not whether there was cocercion, but whether economic power was used in the transaction. The requirement under the court approved settlement agreement that the franchisees lease or purchase all of their equipment from the franchisor is thus a *per se* illegal tying arrangement perpetuated.

Judge Becker has described the coercion doctrine in the law of anti-trust tying as "an increasingly important, yet relatively uncharted area of the law. The few guideposts that do exist stem from District Court opinions." *Ungar v. Dunkin' Donuts*, Trade Reg. Rep., ¶ 60,361, at 66,537 (E.D. Pa. 1975). This Court should grant its Writ to decide this important question of federal law which has not been, but should be, settled.

4. THE TRIAL COURT EXCEEDED ITS POWER AND VIOLATED PETITIONER'S AND OTHER FRANCHISEES' FREEDOM OF CONTRACT RIGHT AS PROTECTED BY THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT BY ITS *IPSO FACTO* REFORMATION OF THE FRANCHISE AGREEMENTS, WITHOUT PRIOR INDIVIDUAL CONSENT.

The original, printed franchise documents are composed of a "Franchise Agreement," a "Sublease" (of land and building) and an "Equipment Lease" (of equipment, fixtures and signs)

comprising nine 8½" x 14" pages, exclusive of schedules (R.A. 73-84). The class settlement agreement approved by the Courts below comprise no less than 119 pages which substantively and materially modify and reform the mutual rights and obligations of the parties, including a long and complicated formula under which the franchisees purportedly have "options" to "purchase" their furniture, fixtures and equipment from IHOP, but which in no way otherwise relieves them of their obligations to lease and purchase their equipment from the franchisor (R.A. 449-459; 535-539). Although the franchisees allegedly have the "option" to "purchase" their equipment, if they exercise their "option" and "purchase" the equipment, they are specifically precluded from selling it, borrowing against it, removing it from the franchised premises or otherwise dealing with it as an "owner." Furthermore, the illegal tie in no way is dissolved, because if purchased, the equipment must be purchased from IHOP, and once purchased, the franchisees are obligated to "sell" it back to IHOP upon termination of the franchise license (R.A. 445-57). Furthermore, even if exercise of one of the options were to invest the franchisees with the ordinarily understood indicia of ownership, they would be illusory and hollow within the context of this case, because all of the furniture, fixtures and equipment, as well as the franchise agreements themselves and the subleases of land and building are pledged to secure a One Hundred Million Dollar obligation which IHOP has to a group of international banks (R.A. 898). One might even ask whether IHOP had the right to enter into such an arrangement or whether a gigantic fraud has been perpetrated upon the Class Members and the Court.

The settlement agreement also provides a complicated formula to determine the price which the franchisees must pay IHOP for their pancake and waffle dry mixes, but again in no way does it relieve them of their obligation to purchase such pancake and waffle dry mixes from IHOP (R.A. 502). In addition, the settlement documents, instead of granting monetary mollification for past damages and injunctive relief against future abuse, modify and reform the existing rights and obligations between the parties as to the purchase of silverware, chinaware, paper and other items; purchase of advertising; as to forfeiture of the restaurant license if the franchisee becomes more than two weeks in default of payments to IHOP; as to the accounting for, and crediting of, weekly payments which the franchisees are obligated to make to the franchisor.

Plaintiffs' Complaints prayed for treble damages and injunctive relief under §§ 1 and 2 of the Sherman Act and § 3 of the Clayton Act, yet the trial court approved a settlement agreement totally devoid of any of the relief prayed for and adopted as its judgment closing the case a result which effectively permits IHOP to retain its pilfered loot.

Petitioner respectfully submits that the trial court's act in modifying and reforming the contractual rights and obligations between the Plaintiff-Franchisees and the Defendant-Franchisor, a result neither contemplated nor sought, constituted excessive imposition of judicial power and authority. The leading case of *Sylvan Beach, Inc. v. Koch,* 140 F.2d 852, 861 (8th Cir. 1944) holds that "A court may not, without the consent of all persons affected, enter a judgment which goes beyond the claim asserted in the pleadings. Unless all parties in interest are in

court and have voluntarily litigated some issue not within the pleadings, the court can consider only the issues made by the pleadings, *and the judgment may not extend beyond such issues nor beyond the scope of the relief demanded.*" (Emphasis added). *See, also, United Transportation Union v. State Bar of Michigan,* 401 U.S. 581 (1917); *Hedges v. Dixon County,* 150 U.S. 182, 192 (1893); *Manufacturers' Finance Co. v. McKey,* 294 U.S. 442, 451 (1935); *Steffen v. United States,* 213 F. 2d 266, 272 (6th Cir. 1954).

Nor may a court, though having obtained jurisdiction of the parties and subject matter of a cause, act in such a manner as to transcend the power conferred by the law, for when it does its judgments "would not be merely erroneous; they would be absolutely void." *Windsor v. McVeigh,* 93 U.S. 274, 23 L. Ed. 914, 917 (1874). An illegal contract once made may not be reformed. *Central Specialties Co. v. Schaefer,* 318 F.Supp. 855, 859 (N.D. Ill. 1970); *see, also, Armstrong Cork Co. v. Lyons,* 366 F.2d 206, 208 (8th Cir. 1966).

The original contracts with their illegal tying arrangements, having been violative of the Sherman and Clayton Acts, were illegal *ab initio* and were not subject to reform, and the lower courts, in reforming them and ignoring the issues at hand and scope of the relief sought, exceeded their judicial power. Such judgments are *a fortiori void.*

5. LEGAL ETHICS AND PUBLIC POLICY PRECLUDE, AND THE CONSCIENCE IS SHOCKED BY, AN *A PRIORI* WRITTEN STIPULATION IN A CLASS ACTION SETTLEMENT AGREEMENT AS TO THE AMOUNT AND MECHANICS OF DISTRIBUTION OF LEGAL FEES TO BE PAID TO PLAINTIFFS' ATTORNEYS UPON ITS APPROVAL BY THE COURT.

The precise issues raised under this Point apparently are novel and have not been subject to judicial investigation before this time, at least insofar as class action settlements are concerned. However, the courts have indicated in analogous situations that Petitioner's postulate is sound. In *Trustees v. Greenough*, 105 U.S. 527, 536, 26 L.Ed. 1157 (1881), lies the "equitable fund" doctrine, upon which the courts have grounded their allowances of legal fees to prevailing parties, although it has been recognized that an actual fund of money or monetary benefit to the prevailing party is not decisive of the issue of either the grant or amount of such fees. *Freeman v. Ryan*, 408 F.2d 1204, 1206 (D.C. Cir. 1968).

On the other hand "the practice of awarding attorneys' fees is one that has been 'delicate, embarrassing and disturbing,' for the courts." *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 469 (2nd Cir. 1974). *See, also, Milwaukee Towne Corp. v. Loew's, Inc.*, 190 F.2d 561, 569 (7th Cir. 1951), *cert. denied*, 342 U.S. 909 (1952). It is also clear that in the court, itself, is reposed the responsibility of determining the efficacy of an award and the amount thereof so as to compensate the attorney for the reasonable value of those services which benefited the claimant. *Milone v. English*, 306 F.2d 814, 819 (D.C. Cir.

1962). *See, also Sprague v. Ticonic National Bank,* 307 U.S. 161 (1939).

In exercising its discretion the trial court is not bound by agreements made between the attorney and the representative members of the class before the commencement of the suit, whether predicated upon an hourly fee basis or a contingent fee basis. *Milwaukee Towne Corp. v. Loew's, Inc., supra. See, also, State of Illinois v. Harper & Row Publishers, Inc.,* 55 F.R.D. 221, 224 (N.D. Ill. 1972).

Although the A.B.A. Code of Professional Responsibility does not contain any specific directives relating to the issue of attorney fee awards in class action settlements, the following Ethical Considerations under Canon 5 have some bearing on the question:

> "EC 5-2. * * * After accepting employment, a lawyer carefully should refrain from acquiring a property right or assuming a position that would tend to make his judgment less protective of the interests of his client."
>
> "EC 5-7. The possibility of an adverse effect upon the exercise of free judgment by a lawyer on behalf of his client during litigation generally makes it undesirable for the lawyer to acquire proprietary interest in the cause of his client or otherwise to become financially interested in the outcome of the litigation. * * *"

Petitioner submits that since the responsibility for the determination of the question of payment of fees as well as the amount of fees rests with the court and in the light of applicable ethical considerations, it is wrong to condone and approve a procedure whereby stipulations are made and agreed upon between counsel for the class and counsel for the defendant

that a specific amount will be paid as attorneys' fees; that such amount is fair and reasonable; and that such fees are to be paid by the defendant, all of which occurred in the instant case. The conclusion can best be stated in the words of the *Manual for Complex Litigation*, § 1.46, p. 57:

> "Two type of provisions in settlement agreements have appeared with sufficient frequency to warrant comment. The first is the agreement that the fees and sometimes expenses of plaintiffs' counsel are to be paid separately by the defendant(s) over and above the settlement . . . . such an arrangement should not be permitted. All amounts to be paid by the defendant(s) are properly part of the settlement fund and should be known and disclosed at the time the fairness of the settlement is considered.
>
> "The effect of such an arrangement is to neutralize the court's power and responsibility to pass upon the reasonableness of the amounts to be paid to plaintiffs' counsel since any reduction by the court in the amount counsel agree upon after the class settlement has been approved will simply go to reduce the aggregate amount of the defendant(s) will pay and will not increase the amount to be paid to the plaintiffs. As a result, there is little incentive for the judge to reduce the agreed upon fees. On the other hand, *the effect of such an arrangement may be to cause counsel for the plaintiffs to be more interested in the amount to be paid as fees than in the amount to be paid to the plaintiff.*" (Emphasis added).

Under the settlement agreement approved by the Courts below any portion of the One Million Two Hundred Fifty Thousand Dollar legal fees agreed by the Defendant to be paid to Plaintiffs' counsel that were not to be approved by the trial court would not have inured to the benefit of the Class Plaintiffs, since there is no "settlement fund" in this case but would

merely be a windfall to the Defendants. Such a result should not be condoned.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the Judgment and Opinion of the Eighth Circuit.

Respectfully submitted,

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APPENDIX

Table of Contents

	Page
Opinion of the Eighth Circuit Court of Appeals	A-1
Judgment of the Eighth Circuit Court of Appeals	A-27
Order of the Eighth Circuit Court of Appeals Denying Petition for Rehearing and Rehearing En Banc	A-29
Judgment of the United States District Court for the Western District of Missouri	A-30
Prior Opinion of the United States Court of Appeals	A-39
Prior Opinion and Order of the United States District Court for the Western District of Missouri	A-42

OPINION OF THE EIGHTH CIRCUIT COURT OF APPEALS

UNITED STATES COURT OF APPEALS
For The Eighth Circuit

Appeals from the United States District for the Western District of Missouri

No. 74-1066
Abraham Grunin,

Appellant,

v.

International House of Pancakes,
a Division of International Industries, Inc.,

Appellee.

No. 74-1194
Shapiro, Posell & Pilling and Mitchell S. Shapiro,

Appellants,

v.

International House of Pancakes,
a Division of International Industries, Inc.,

Appellee.

No. 74-1271
Mark J. Klein,

Appellant,

v.

International House of Pancakes,
a Division of International Industries, Inc.,

Appellee.

No. 74-1282
David Berger, P.A.,

Cross-Appellant,

v.

Mark J. Klein,

Cross-Appellee.

Submitted: October 14, 1974
Filed: March 17, 1975

Before VOGEL, Senior Circuit Judge, LAY and STEPHENSON, Circuit Judges.

STEPHENSON, Circuit Judge.

These consolidated appeals arise out of the district court's[1] approval of a proposed settlement, pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, of a private antitrust national class action brought by International House of Pancakes (IHOP) franchisees against their franchisor, a division of International Industries, Inc. The approved settlement, filed on November 29, 1973, calls for revisions of the franchise and equipment lease agreements between the parties (valued in excess of $12 million to the class), the payment by IHOP of $500,000 to a subclass of former franchisees, and grants a fee award of 1.2 million to counsel for the class. In this court one appellant contends that the approval of the settlement was improper because the notice given to class and subclass members did not satisfy the requirements of Rule 23 or due process and because the agreement perpetuated a number of the antitrust violations that were the primary focus of the initial litigation. Other appellants challenge the district court's allocation of attorneys' fees. Two of them claim that the court improperly denied their fee requests. A third claims that the court made its fee awards based on insufficient data regarding co-lead counsel Berger's claim for compensation. Finally, Berger has filed a cross-appeal claiming that the court's award to class counsel Klein was excessive and should be reconsidered.

We conclude that the district court did not abuse its discretion

[1] The Honorable William R. Collinson, United States District Judge for the Western District of Missouri.

in its notice procedure or in its approval of the settlement in this case. The record reveals that the court properly fulfilled its obligation to all parties involved despite the length and complexity of the litigation. However, recent judicial developments in the area of attorneys' fee awards in class action settlements compel us to reverse in part the fee award order and remand for further hearings in accordance with the standards set forth in this opinion.

On August 23, 1971, the Judicial Panel on Multi-District Litigation transferred to the Western District of Missouri nine pending actions that had been instituted by current or former franchisees of IHOP against the franchisor. *In re International House of Pancakes Litigation,* 331 F.Supp. 556 (Jud. Pan. Mult. Lit. 1971). On October 26, 1971, the district court ordered that these actions be maintained as a class action pursuant to Fed. R. Civ. P. 23. In accordance with that order, two categories of plaintiffs were created — a class composed of current franchisees and a subclass of former franchisees. Original notice of the class action was mailed to all prospective class members on November 19, 1971. Subsequently a similar notice was sent to those parties qualifying for subclass membership

The class action sought injunctive relief, treble damages, and attorneys' fees from IHOP on the basis that the franchise agreements and equipment leases executed between franchisor and franchisee violated the Sherman Act, 15 U.S.C. §§ 1 & 2 (1970), and the Clayton Act, 15 U.S.C. § 14 (1970). Specifically the franchisees alleged that IHOP illegally tied to the acquisition of a standard 15- or 20-year restaurant franchise the requirement that the franchisee lease or purchase a wide

variety of essential products and services from IHOP or an IHOP-approved supplier. Among these "tied" items were restaurant furniture and equipment,[2] dining room supplies, menus, food items, insurance, advertising, training, management counseling and bookkeeping services.[3]. The franchisees sought additional damages on the theory that these goods and services had been supplied at a price greatly in excess of fair market value[4] and on the grounds that the IHOP prohibition against selling any non-IHOP approved and priced food items deprived them of the opportunity to increase their individual profits.

Following the appointment of counsel for the class, extensive discovery was undertaken by the parties.[5] Within a short time serious settlement negotiations began. On April 24, 1973, a proposed settlement agreement was forwarded to the class and subclass members along with notice of a hearing to be held on June 1, 1973, in Kansas City. The agreement provided for a damage fund of $4.025 million (less attorneys' fees of $1.11 million) but did not amend the equipment leases in any material respect. This factor was the major subject of the objections

[2] The equipment lease provided that the franchisee lease all of his restaurant equipment from IHOP in exchange for lease payments of roughly $280 per week for the first five years, $190 per week for the following ten years, and $160 per week for the last five years of the agreement.

[3] These management and bookkeeping services were supplied by IHOP in return for a weekly payment of between 5 and 6.2% of the franchisee's gross receipts with a $100 minimum.

[4] For example, the pancake mix which the agreement required the franchisees to purchase from IHOP was sold to them at a markup of 100% over raw costs.

[5] According to counsel for International Industries, Inc., 20,000 pages of depositions were taken in this case and approximately 100,000 documents were produced for inspection by the parties.

voiced at the June hearing by a group of dissatisfied franchisees.

The district court, in a memorandum and order issued on July 12, 1973, rejected the proposed settlement. *In re International House of Pancakes Litigation,* 1973-2 Trade Cases ¶ 74,616 (W.D. Mo.), *aff'd,* 487 F.2d 303 (8th Cir. 1973). The court acknowledged that the "precarious financial condition" of IHOP caused plaintiffs' counsel to conclude that "any substantial monetary judgment that might be recovered would be uncollectible, and would only result in the bankruptcy of the defendant." Nonetheless, the court stated that approval of the settlement would continue those franchise and lease provisions which allegedly violated antitrust laws, would bar class members from seeking further injunctive relief, and would provide insignificant monetary damage relief to the franchisees. The court concluded: "Certainly, they [the franchisees] are entitled to their day in court on this vital issue, and this Court will not foreclose them by approval of this settlement." The rejection was subsequently affirmed by this court in *In Re International House of Pancakes Litigation,* 487 F. 2d 303 (8th Cir. 1973).

On November 7, 1973, a second settlement proposal was submitted to the court for its approval. This agreement differed from the first in that it gave each class member the option to purchase his own equipment at a rate lower than the terms of the lease or to continue to lease at a reduced rate. In addition, the settlement amended the franchise agreement in that IHOP would require its franchisees to purchase from it only their pancake flour (at a lesser markup) and coffee. The agreement also expanded and made specific the services to be provided

by IHOP in exchange for the management fee and granted other concessions. Finally, the settlement created a fund of $500,000 to be shared by the subclass of former franchisees and provided for the payment of up to $1.25 million in attorneys' fees at the court's direction. Notice was sent out on November 8, 1973, and a hearing on the proposal began on November 28, 1973. In contrast to the June hearing, there were no formal objections filed with the court regarding the new proposal. However, counsel for appellant Grunin participated in the hearing and voiced his objections through cross-examination.[6] At the close of the hearings the district court approved the settlement stating simply that it was "fair, reasonable, and adequate as to said class and sub-class plaintiffs." Another order was entered on February 1, 1974, awarding attorneys' fees to respective claimants. Appeals were taken from the entry of each order.

I.

The initial claim set forth by appellant Grunin is that the notice sent to class and subclass members in November regarding the second proposed settlement was so inadequate as to timing, content, and means of transmission that it violated the requirements of Rule 23 and the dictates of due process. We disagree.

---

[6] Appearing as amici curiae before this court are nine IHOP franchisees who object to the settlement. They claim that their views are shared by a significant number of other franchisees. However, they claim that because of the short notice period and the failure of counsel for the IHOP franchisees' association to enter their objections at the hearing, their opposition was not considered by the court in approving the settlement. Even if we add these nine individuals to the list of objectors, the record reveals that most IHOP franchisees favored the settlement.

By virtue of the fact that an action maintained as a class suit under Rule 23 has res judicata effect on all members of the class, due process requires that notice of a proposed settlement be given to the class. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 172-77 (1974); *Greenfield v. Villager Industries, Inc.*, 483 F.2d 824, 833-34 (3d Cir. 1974); *Air Line Stewards & Stewardesses Ass'n, Local 550 v. American Airlines, Inc.*, 455 F.2d 101, 108 (7th Cir. 1972). *See also* 3B *J. Moore, Federal Practice* ¶ 23.80[1] at 23-1502; Dole, *The Settlement of Class Actions for Damages*, 71 Colum. L. Rev. 971, 976-78 (1971); *Manual for Complex Litigation* §§ 1.45 & 1.46 (1973).

The notice given must be "reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). In addition, the notice must "reasonably convey the required information * * * and it must afford a reasonable time for those interested to make their appearance." *Id.* (citations omitted). *See also Greenfield*, 483 F. 2d at 834; *Milstein v. Werner*, 57 F.R.D. 515, 518 (S.D.N.Y. 1972) However, Rule 23(e) provides that notice be given "in such manner as the court directs." Thus, the mechanics of the notice process are left to the discretion of the court subject only to the broad "reasonableness" standards imposed by due process. *See* 7A *C. Wright and A. Miller, Federal Practice and Procedure*, Civil § 1797 at 237 (1972).

In the instant case notice was sent to members of the class and subclass on November 9, nineteen days prior to the hearing. Appellant Grunin alleges that this time period was so brief

that it did not give class members an opportunity to retain counsel and formulate a meaningful objection to the lengthy and extremely complicated settlement agreement. Furthermore, since only a summary of the agreement accompanied the notice, appellant argues that the actual time for preparing an objection was additionally shortened by the time it took to request and receive a copy of the proposal.[7] In his view, the time period coupled with the complexity of the agreement constituted a violation of due process.

It appears that appellant is incorrectly attempting to limit our review of the factual setting in this case to the 19-day notice period. The fact that the class members here had been engaged in an ongoing action for almost two years prior to the November settlement notice is highly relevant. The record reveals that some 75 objecting class members were represented by counsel at the June settlement hearing, for which a lengthier period of notice was given. Further evidence indicates that all counsel who appeared at the June hearing were kept informed of all subsequent developments in the negotiations, as was the IHOP Franchisee Association. In addition, the Board of Directors of that organization (which included appellant Grunin) endorsed the settlement agreement in October and spent the ensuing weeks lobbying among its membership for support. Thus, in view of this evidence of "continuing notice," we are convinced that the district court committed no abuse of discretion; nor did the class have its due process rights violated by the timing of the notice. *See Air Line Stewards & Stewardesses Ass'n,*

[7] The notice stated that a copy of the agreement could be obtained from the clerk of the court in Kansas City or from the offices of counsel in Kansas City, Philadelphia, Los Angeles, and San Francisco.

Local 550 v. American Airlines, Inc., supra at 108. In addition, the record discloses that no request for a continuance was made at any time before or during the November hearing.

Appellant Grunin next contends that the method of notice used in this case — mailing notice to the last known addresses of class and subclass members — was constitutionally insufficient and therefore an abuse of discretion by the district court. Relying on *Lamb v. United Security Life Co.*, 59 F.R.D. 25 (S.D. Iowa 1972), appellant urges that, since approximately one-third of the class members were not reached by the mailing, supplemental notice by means of publication should have been ordered by the court.

We are satisfied, however, that notice by publication was unnecessary in this case for due process purposes and probably would have been of little value in alerting members of the class and subclass that were previously uninformed. In *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174-77 (1974), the Supreme Court specifically held that individualized notice by mail to the last known address was the "best notice practicable" in a class action contest. The Court also reiterated its dissatisfaction with notice by publication. *Id.* As stated by the Court in *New York v. New York, N.H. & H. R.R.*, 344 U.S. 293, 296 (1953), "Notice by publication is a poor and sometimes a hopeless substitute for actual service of notice. Its justification is difficult at best." *See also Schroeder v. City of New York*, 371 U.S. 208, 211-13 (1962); *Walker v. City of Hutchinson*, 352 U. S. 112 (1956). Since the 90 to 100 class and subclass members who did not receive mailed notices were, according to their last

addresses, scattered throughout the nation, the publication of notice in three or four newspapers as suggested in *Lamb* would have been fruitless. Under the circumstances the court properly made use of the "last known address" method and was not required to expend further time and money on less productive notice efforts.

Appellant's final due process contention is that the notice did not provide the fair and neutral recital of the proposed settlement's term required as an attribute of due process. *See Milstein v. Werner, supra.* In particular, appellant asserts that the notice was misleading in its description of the subclass and special subclass damage fund and in its summation of the various options affecting the equipment lease. The misleading nature of the notices was compounded, in Grunin's view, by the fact that the actual settlement agreement was not forwarded to the parties. Each of these allegations is without merit.

As a general rule, the contents of a settlement notice must "fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with [the] proceedings." *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*, 323 F.Supp. 364, 378 (E.D. Pa. 1970), *aff'd sub nom. Ace Heating & Plumbing Co. v. Crane Co.*, 453 F.2d 30 (3d Cir. 1971). *See also Air Line Stewards & Stewardesses Ass'n, Local 550 v. American Airlines, Inc., supra* at 108; 7A *C. Wright and A. Miller, Federal Practice and Procedure* § 1797 at 238. In addition, the notice on its face must be "scrupulously neutral" and emphasize that the court is expressing no opinion

on the merits of the case or the amount of the settlement. *See Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., supra* at 378; *Cannon v. Texas Gulf Sulphur Co.*, 55 F.R.D. 308, 313 n. 2 (S.DNY 1972) In effectuating this neutral apprisal the notice may consist of a very general description of the proposed settlement, including a summary of the monetary or other benefits that the class would receive and an estimation of attorneys' fees and other expenses. *Manual for Complex Litigation* §§ 1.45 & 1.46 (and related appendices) (1973).

We are satisfied that notices in the instant case complied with these standards. They were modeled after the notices used in *West Virginia v. Charles Pfizer & Co.*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971), which now serve as exemplars of class action settlement notices in the *Manual for Complex Litigation* § 1.45 (appendix) (1973). Viewed in their entirety, the notices provide the required settlement information with sufficient neutrality.

Nor do we find the notices in this case to be misleading. The fact that the notices do not fully explore the equipment lease options and the various qualifications for inclusion in the subclass fund is immaterial. Class members are not expected to rely upon the notices as a complete source of settlement information. *See Mungin v. Florida East Coast R.R.*, 318 F. Supp. 720, 733-34 (N.D. Fla. 1970), *aff'd per curiam*, 441 F.2d 728 (5th Cir.), *cert. denied*, 404 U.S. 897 (1971). Any ambiguities regarding the substantive aspects of the settlement could be cleared up by obtaining a copy of the agreement as provided

for in the first paragraph of the notice. In effect, appellant is suggesting that a copy of the agreement must be included with the notice in order to satisfy due process standards. We have found no basis for such a requirement. *See generally Manual for Complex Litigation* § 1.45 (1973).

Finally, we note with regard to each of the due process claims considered above that they were raised for the first time in this court despite the fact that counsel for appellant Grunin appeared at the November settlement hearing before the district court. If counsel had brought these objections to the attention of the court at that time or had sought a continuance, the expressed need for appellate relief on these grounds might well have been eliminated.

II.

The second major contention set forth by appellant Grunin is that the district court abused its discretion in approving a settlement that was not fair, reasonable, and adequate. Specifically it is alleged that the agreement perpetuates illegal tying requirements relating to equipment, supplies, and services that accompany the acquisition of an IHOP franchise; that the benefits of the settlement to the class are illusory; that the court did not have sufficient evidence before it to make a knowledgeble comparison of the benefits of the settlement as compared to the likely reward of continued litigation; and that the settlement fails to establish formulae from which subclass damages could be determined. We reject each of these claims.

Under Rule 23(e) the district court acts as a fiduciary who must serve as a guardian of the rights of absent class members.

See, e.g., Greenfield, 483 F.2d at 832; *Norman v. McKee,* 431 F.2d 769, 774 (9th Cir. 1970); *Percodoni v. Riker-Maxson Corp.,* 50 F.R.D. 473, 478 (S.D.N.Y. 1970), *aff'd sub nom. Farber v. Riker-Maxson Corp.,* 442 F.2d 457 (2d Cir. 1971). The court cannot accept a settlement that the proponents have not shown to be fair, reasonable, and adequate. *See, e.g., City of Detroit v. Grinnell Corp.,* 495 F.2d 448, 455 (2d Cir. 1974); *United Founders Life Insurance Co. v. Consumers National Life Insurance Co.,* 447 F.2d 647, 655-56 (7th Cir. 1971); *Young v. Katz,* 447 F.2d 431, 433 (5th Cir. 1971).

Our review of the settlement approved by the district court in this case is guided by the principle that:

> Such a determination is left to the sound discretion of the trial judge. Great weight is accorded his views because he is exposed to the litigants, and their strategies, positions and proofs. He is aware of the expense and possible legal bars to success. Simply stated, he is on the firing line and can evaluate the action accordingly.

Ace Heating & Plumbing Co. v. Crane Co., 453 F.2d 30, 34 (3d Cir. 1971). Only upon a clear showing that the district court abused its discretion will this court intervene to set aside a judicially approved class action settlement. *In re International House of Pancakes Franchise Litigation,* 487 F.2d 303, 304 (8th Cir. 1973). *See also City of Detroit,* 495 F.2d at 455 With these precepts in mind we turn to appellant's charges of error.

Appellant Grunin contends that the settlement perpetuates antitrust violations by virtue of the fact that it does not relieve franchisees from the requirement that they purchase or lease

all equipment and furniture from IHOP. In addition, the agreement retains the stipulation, that franchisees obtain all their pancake flour mix and coffee from IHOP and that they must pay a weekly service charge to IHOP for bookkeeping, management, advertising, and other related services. In appellant's view, these provisions constitute blatant antitrust violations which render the court's approval of the settlement invalid as a matter of law.

We agree with appellant's statement that a court cannot lend its approval to any contract or agreement that violates the antitrust laws. *See Kelly v. Kasuga*, 358 U.S. 516, 520 (1959); *Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U.S. 227, 261-67 (1909). However, we are equally mindful of the fact that "neither the trial court in approving the settlement nor this Court in reviewing the approval have the right or the duty to reach any ultimate conclusions on the issues of fact and law which underlie the merits of the dispute." *City of Detroit*, 495 F.2d at 456. As stated in *Young v. Katz*, 447 F.2d 431, 433 (3d Cir. 1971), "In examining a proposed compromise for approval or disapproval * * * the court does not try the case. The very purpose of compromise is to avoid the delay and expense of such a trial." *See also West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1086; *Florida Trailer and Equipment Co. v. Deal*, 284 F.2d 567, 571 (5th Cir. 1906); *Percodoni v. Riker-Maxson Corp., supra* at 477. *See generally McGaugh & Lerach, Termination of Class Actions: The Judicial Role*, 33 U. Pitt. L. Rev. 445, 458-65 (1972). Thus, unless the terms of the agreement are per se violations of antitrust law, we must

apply a "reasonableness under the totality of the circumstances" standard to the court's approval. Based on the record before us, we cannot say as a matter of law that the settlement agreement included any such violations.

Our examination reveals that the issue of illegality was vigorously contested by the parties. While two cases relied upon heavily by appellant, *Siegal v. Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1971), and *Chock Full O' Nuts Corp., Trade Reg. Rep.* ¶ 20,441 (F.T.C. 1973), hold that requiring a franchisee to lease or purchase equipment or supplies in connection with the acquisition of a franchise is prohibited by the Sherman Act, both opinions acknowledged the existence of a variety of affirmative defenses that needed to be considered in each case. *See also Susser v. Carvel Corp.*, 332 F.2d 505, 516-17 (2d Cir. 1964), *cert. denied*, 381 U.S. 125 (1965).

In addition, appellees here contend that because the lease of equipment was not made a prerequisite to acquiring a franchise, the absence of coercion makes the *Chicken Delight* rationale inapposite. *See United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 159 (1948); *Advance Business Systems & Supply Co. v. SCM Corp.*, 415 F.2d 55, 69 (6th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970). Furthermore, they urge that neither the joining of the equipment lease with the franchise or the coffee and pancake flour with the franchise constitute tying arrangements because these goods and services are inseparable from the franchise. Thus, the "two product" test for illegality under *Chicken Delight* is not satisfied. *Kugler v. AAMCO Transmissions, Inc.*, 406 F.2d 1214, 1215 (8th Cir. 1972). *See also*

Beefy Trail Inc. v. Beefy Trail International, Inc., 348 F.Supp. 799, 806-07 (N.D. Fla. 1972).[8]

This brief survey of the theories advanced by the parties is not intended to be an appraisal of the merits of the claims in contention. It does illustrate, however, that the alleged illegality of the settlement agreement is not a legal certainty. Thus, having determined that the settlement terms were not illegal per se, we must test appellant's remaining claims of error against the broad area of discretion left to the district court.

The charge that the benefits of the settlement to the class are illusory calls into question the overall adequacy of the settlement. In making such an assessment "[t]he most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in the settlement." *West Virginia v. Chas. Pfizer & Co.*, 440 F.2d at 1058. *See also City of Detroit*, 495 F.2d at 455-59; *Young v. Katz*, 477 F.2d at 433-34. In addition, the court should consider such factors as the defendant's overall financial condition and ability to pay; the complexity, length and expense of further litigation; and the amount of opposition to the settlement. *See City of Detroit*, 495 F.2d at 463. Our evaluation of the settlement in light of these factors reveals that the agreement provided substantial benefits to the class.

In discussing the per se illegality charge made by appellant

[8] The *Beefy Trail* holding is based upon the theory that the sale of a fully equipped restaurant from the franchisor constitutes only one product. 348 F. Supp. at 805-07. Appellees argue that many of the current IHOP franchisees have purchased established restaurants and therefore cannot satisfy the necessary two-product test for illegality.

Grunin, we suggested that the franchisees' probability of complete success in their suit against IHOP was by no means certain. There is evidence to suggest that a total victory, including a voiding of the equipment leases and an award of damages, would have been financially disastrous if not fatal to IHOP. Nonetheless, the district court in rejecting the first settlement proposal indicated that some revision in the equipment lease was essential. Given the court's directive and IHOP's cash flow difficulties, the parties worked out a settlement which gave valuable concessions to the franchisees yet maintained IHOP's corporate viability. It is estimated that the equipment lease options provided in the settlement were worth at least $131,000 to each class member with the total value to the class exceeding $12.5 million. Given the additional fact that any compromise involves some give and take by both sides, we feel that the district court's approval of this settlement was justified.[9]

Next, appellant argues that the district court did not have sufficient probative evidence to enable it to weigh the benefits of the settlement against the likely rewards of continued litiga-

[9] We note parenthetically that the task of this court might have been easier had the district court provided us with a memorandum in which it detailed the reasons for its approval of this settlement as opposed to the June proposal. After extensive examination of the record it is clear to us that the district court rejected the June agreement because it provided no relief whatsoever from the equipment lease — it was an uncompromising compromise. Thus, we are convinced that the signifcant changes in that equipment lease made by the November settlement, especially given the financial strictures to which IHOP was subject, were an important factor in the court's approval. The court's insistence on this issue was instrumental, we feel, in bringing about the more valuable November settlement.

tion. It is claimed that the exhaustive discovery in this case was limited to the issue of liability as opposed to the issue of damages and the prospects for monetary recovery. This claim is wholly unsupported by the record. The documents in the record, the transcripts of the hearings in June and November, and the memorandum issued by the court when it rejected the June settlement are replete with evidence regarding IHOP's financial condition, the amount of money paid to IHOP by the franchisees, and the parameters of the relief sought by the class. This immense repository of evidence, coupled with the district court's long-term involvement with the case, convinces us that every relevant fact was before the court. *See City of Detroit,* 495 F.2d at 462-64.

In addition, we note that appellant's allegations are not accompanied by any reference to specific weaknesses in the evidence before the court. As the Second Circuit recognized in the *City of Detroit* decision:

> To allow the objectors to disrupt the settlement on the basis of nothing more than their unsupported suppositions would completely thwart the settlement process. On their theory no class action would ever be settled, so long as there was at least a single lawyer around who would like to replace counsel for the class and start the case anew. * * * Although the parties reaching the settlement have the obligation to support their conclusion to the satisfaction of the District Court, once they have done so, they are not under any recurring obligation to take up their burden again and again *ad infinitum* unless the objectors have made a clear and specific showing that vital material was ignored by the District Court.

City of Detroit, 495 F.2d at 464. Since all the relevant facts

have been thoroughly considered by the court, this litigation should now be at an end.[10]

III.

The final group of issues to be decided in this appeal relates to the district court's allocation of the $1.25 million in attorneys' fees provided for in the settlement agreement. The three appeals from the award of fees assert that the trial court erred in denying fees to attorney Fichtner, in failing to compensate attorney Shapiro for his efforts in opposing the June proposal, and in employing improper standards in making the award to attorney Berger and his firm. Berger cross-appeals against Klein claiming that the award to Klein was excessive.

The district court's award of attorneys' fees in a class action settlement will be set aside by this court only upon a showing that the action amounted to an abuse of discretion. *See City of Detroit*, 495 F.2d at 468-75; *Merola v. Atlantic Richfield Co.*, 493 F.2d 292, (3d Cir. 1974); *Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 166 (3d Cir. 1973); *Alpine Pharmacy, Inc. v. Chas. Pfizer & Co.*, 481 F.2d 1045, 1050 (2d Cir. 1973); *Ace Heating & Plumbing Co. v. Crane Co.*, 453 F.2d 30, 35 (3d Cir. 1971). We hold that the district court's denial of all or part of the fee requests made by appellants Fichtner and Shapiro was consistent with the sound exercise of that discretion. However, we feel that the award to Berger and his firm was made on the

[10]Appellant's claim that the agreement is defective because it does not provide a formula for the computation of damages for individual subclass members is found by this court to be devoid of merit and will not be discussed.

basis of insufficient specific evidence regarding the time spent on this litigation and should be remanded to the district court for reevaluation in light of the standards set forth in *City of Detroit v. Grinnell Corp., supra,* and related cases.

Appellant Fichtner's fee request was denied because, in the district court's view, it appears that * * * he is inconsistent in applying for a fee of $75,000 for assisting in securing a settlement he contends confers no substantial benefits on the class or subclass." Order Awarding Attorneys' Fees at 8. We can find no basis upon which to disagree with the court's conclusion. Unlike the court in the *Ace Heating* case, the denial of fees to Fichtner was not inconsistent with the treatment afforded any other attorney who had a similar role in the litigation. *See Ace Heating & Plumbing Co. v. Crane Co., supra* at 35. Further, the denial here came after Fichtner had been given an opportunity at an evidentiary hearing to detail the manner in which he felt that his services benefited the class. *Cf. White v. Auerbach,* 500 F.2d 822, 82-30 (2d Cir. 1974).[11] The decision to deny Fichtner's application for fees was the result of due consideration of all relevant factors and will not be disturbed.[12]

Appellant Shapiro appeals from the district court's denial of

[11]In addition, the court in *White v. Auerbach* was influenced by the fact that the judge who presided over the applications for attorneys' fees had not presided over the substantive proceedings. 500 F. 2d at 828. That fact situation is not present here.

[12]It has been contended to this court that Fichtner's appeal on this issue should have been dismissed for want of jurisdiction, pursuant to F.R.A.P. 3(a), because it was untimely. However, since other parties have properly appealed the same issue, we have treated Fichtner's filing out of time as merely a failure to comply with a rule of practice. So classified, it may be waived by the court to allow the appeal. *See 9 J. Moore, Federal Practice* § 204.11[5](1973).

his application for fees based on his opposition to the June settlement agreement that was subsequently rejected by the district court. He contends that his opposition to that settlement conferred a benefit to the class by making the final settlement offer possible and thus he should be recompensed for his efforts under the "equitable fund" doctrine. *Fowler v. Schwartzwalder*, 498 F.2d 143, 144-45 (8th Cir. 1974). *See also Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 391-92 (1970); *Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939); *City of Detroit*, 495 F.2d at 468-69; *Alpine Pharmacy, Inc.*, 481 F.2d at 1057. Shapiro asserts that the district court's fee award order reflects the fact that inadequate and improper consideration was given to his claim for compensation under this theory. We disagree.

The court in its fee award order specifically found that Shapiro's efforts up through the time of the June hearing were done on behalf of clients who retained him on a non-contingent basis for that purpose. As a result, the court chose to deny his request for additional fees. That decision was open to the court in the exercise of its discretion. *Alpine Pharmacy, Inc.*, 481 F.2d at 1053-54; *Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 341 F.Supp. 1077, 1092-96 (E.D. Pa. 1972), *remanded on other grounds*, 487 F.2d 161 (3d Cir. 1973). The fact that the court awarded Shapiro $10,000 for his role in obtaining the final settlement is clear evidence of the court's conscientious efforts to arrive at an equitable allocation of fees through the prudent exercise of its discretion.

Finally appellant Klein raises two issues for our consideration. The first is whether the factual record surrounding the claim for fees by attorney David Berger and David Berger, P.A., provided a sufficiently detailed basis for the district court's award of $325,000.[13] Klein further contends that, on the basis of his contributions to the class as shown by the record, the court erred in compensating him at an hourly rate that was significantly lower than that awarded to other attorneys for the class.

In order to evaluate Klein's initial claim, we must outline the legal basis on which it is made. In recent years considerable judicial attention has been focused upon the issue of attorney fee awards in class action settlements. Since in most class actions the fees have been deducted from the total class recovery under the "equitable fund" theory (in connection with Rule 23), the primary concern has been to establish standards which can be used to insure that these awards reasonably compensate the attorneys for their services yet are not excessive arbitrary, or detrimental with respect to the class. *See, e.g., City of Detroit*, 495 F.2d at 469-70; *Merola v. Atlantic Richfield Co.*, 493 F.2d at 297-98; *Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d at 167.

The formulation adopted by the Third Circuit in *Lindy Brothers* and reiterated in *Merola* provides a typical example

[13]The issue of Klein's standing to challenge the fee award to Berger was raised in oral argument. We do not reach this issue. It is our view that since the settlement has been challenged, the reasonableness of the attorneys' fees is within the overall supervisory review of this court.

of the factors that courts have been instructed to consider in establishing fee awards:

a) the number of hours spent in various legal activities by the individual attorneys,

b) the reasonable hourly rate for the individual attorneys,

c) the contingent nature of success, and

d) the quality of the attorneys' work.

Merola v. Atlantic Richfield Co., 493 F.2d at 297. *See also City of Detroit*, 495 F.2d at 468-74; *Wilderness Society v. Morton*, 495 F.2d 1026, 1036-37 (D.C. Cir. 1974); *Brandenburger v. Thompson*, 494 F.2d 885, 888-90 & n. 7 (9th Cir. 1974); *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-20 (5th Cir. 1974). However, as the Second Circuit recognized in *City of Detroit*, the "only legitimate starting point" in establishing fees is "by merely multiplying attorney's hours and typical hourly rates. * * * It is only after such a calculation that other, less objective, factors can be introduced into the calculus." 495 F.2d at 471.

In order to insure that all necessary data is before the court, attorneys are generally required to submit detailed affidavits which itemize and explain their fee claims. Also, many courts have required that an evidentiary hearing be held at which each claimant is subject to cross-examination. *See City of Detroit*, 495 F.2d at 471-74. The district court in this case held such a hearing following the submission of affidavits. The record reveals that all of the attorneys involved, except Mr. Berger, furnished the court with detailed information concerning the total number of hours spent, how the time was used

(e.g., research, negotiations), by whom (e.g., senior partners, associates), and what standard hourly rate was charged by each category of attorney for each type of work. At no time did Mr. Berger supply the court with *any* information relating to standard hourly rates for himself or his firm. Nor did he furnish a complete breakdown of who spent time in what endeavors. We see no reason for applying one standard to Berger and another to all other attorneys involved.

Berger argues in response that where, as here, the attorneys' fees are set aside in the settlement rather than deducted from the class recovery, factors other than the time spent should be emphasized in allocating fees. Among those factors he lists (1) the standing of counsel at the bar; (2) the risk of the litigation; (3) the responsibility undertaken; and (4) the amount that it would have been reasonable to charge a victorious plaintiff. *See Trans World Airlines, Inc. v. Hughes,* 312 F.Supp. 478, 480 (S.D.N.Y. 1970), *modified on appeal,* 449 F.2d 51 (2d Cir. 1971), *rev'd on other grounds,* 409 U.S. 363 (1973). Given these standards, Berger feels that the award was entirely justified.

We do not dispute Mr. Berger's credentials as an experienced antitrust class action attorney. Nor do we disagree with his contention that the factors listed above must be given serious consideration by a court in making its fee awards. However, as stated in *City of Detroit,* the valuation of an attorney's services must begin with the consideration of hours and rates. Without such an inquiry there is a grave danger that the bar and bench will be brought into disrepute, and there will be prejudice to

those whose substantive interests are at stake and who are unrepresented except by the very lawyers who are seeking compensation. *Cherner v. Transition Electronic Corp.*, 221 F. Supp. 55, 61 (D. Mass. 1936)." 495 F.2d at 470-71.

The argument that a lesser standard should apply for purposes of the allocation of fees merely because the attorneys have had the foresight to provide for themselves in the agreement is equally unavailing. At some point the discretion of the court must be exercised in determining what portion of the $1.25 million is "fair, reasonable and adequate." In view of the precarious financial situation of the company, which was noted by the court in making its awards, we are convinced that the amount of attorneys' fees actually awarded is extremely important to the class. For example, if the court had not awarded the whole $1.25 million, the IHOP cash flow would have been improved by whatever portion was unused, thus increasing the chances that the franchisor would remain able to carry through on its contractual obligations under the settlement.

The case at bar resembles in many respects the situation faced by the Third Circuit in *Merola v. Atlantic Richfield Co., supra.* In that case the settlement agreement provided for the payment of "reasonable attorneys' fees," thus removing it from the "equitable fund" category of cases. Nonetheless, the court found that the four-part test from *Lindy Brothers* was fully equitable.

> The first two factors (time spent and reasonable rate) produce what might be considered the market value of the attorneys' services. The latter two (risk and quality of work) permit the district judge the needed flexibility to

> tailor the award to the actual performance of counsel. The end result — an amalgram of expected value and delivered performance — represents a reasonable fee under normal circumstances.

493 F.2d at 298. We concur in this analysis. The *Lindy* standards as interpreted in *City of Detroit* and *Merola* provide the appropriate test for determining any discretionary fee award in a class action context.

In reaching this decision, we are not critical of the district court's actions in this case. At the time of the court's fee award, *City of Detroit* and *Merola* had not been decided; nor had this court addressed the issue of attorney fee awards under comparable circumstances. Accordingly, this case will be remanded to the district court for the holding of an additional hearing on the fee award made to David Berger and David Berger, P.A.

The contention by Klein regarding the impropriety of his fee award in light of the hourly rates awarded to other attorneys in the class is not supported by the record. The court had ample evidence before it concerning Klein's efforts in the litigation. The standards we have enunciated above allow for such variations in fees. The cross-appeal by Berger is similarly denied.

This case is affirmed in all respects except for the award of attorneys' fees to David Berger and David Berger, P.A. On that issue we remand for reconsideration by the district court in accordance with this opinion.

A true copy.

Attest

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

JUDGMENT OF THE EIGHTH CIRCUIT COURT OF APPEALS

JUDGMENT

UNITED STATES COURT OF APPEALS
For The Eighth Circuit
September 1974 Term

Appeals from the United States District Court for the Western District of Missouri.

No. 74-1066
Abraham Grunin,
v. *Appellant,*
International House of Pancakes
a Division of International Industries, Inc.,
Appellee.

No. 74-1194
Shapiro, Posell & Pilling and Mitchell S. Shapiro,
v. *Appellants,*
International House of Pancakes,
a Division of International Industries, Inc.,
Appellee.

No. 74-1271
Mark J. Klein,
v. *Appellant,*
International House of Pancakes,
a Division of International Industries, Inc.,
Appellee.

No. 74-1282
David Berger, P.A.,
v. *Cross-Appellant,*
Mark J. Klein,
Cross-Appellee.

These causes came on to be heard on the record from the

United States District Court from the Western District of Missouri and were argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in these causes be and the same is hereby affirmed in all respects except for the award of attorneys' fees to David Berger and David Berger, P.A.

It is further ordered and adjudged by this Court that that issue be and is hereby remanded to the said District Court for reconsideration by the District Court in accordance with this Court's opinion filed this day herein.

March 17, 1975

ORDER OF THE EIGHTH CIRCUIT COURT OF APPEALS DENYING PETITION FOR REHEARING AND REHEARING EN BANC

UNITED STATES COURT OF APPEALS
For The Eighth Circuit

Appeal from the United States District Court for the Western District of Missouri

September Term, 1974

74-1066

Abraham Grunin,

Appellant,

v.

International House of Pancakes, etc.,

Appellee.

The Court having considered petition for rehearing en banc filed by counsel for appellant and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

April 8, 1975

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI,
WESTERN DIVISION

IN RE:
INTERNATIONAL HOUSE OF PANCAKES
FRANCHISE LITIGATION

M.D.L. DOCKET NO. 77
CLASS ACTIONS

Robert J. Helfenbein, et al. v.
International Industries, Inc., et al., No. 17281-2

Joe Jimmie Reed, et al. v.
International Industries, Inc., No. 19231-2

Richard L. Erickson v.
International Industries, Inc., No. 19666-2

Robert J. Helfenbein, et al. v.
International Industries, Inc. et al., No. 17282-2

Rudolf Weth v. International Industries, Inc., No. 19665-2

JUDGMENT

Joint Motion For Approval Of "Settlement Agreement" heretofore having been filed herein by counsel of record for the class plaintiffs and sub-class plaintiffs and counsel for the defendant, the Court, in accordance with the provisions of Rule 23(e) of the Federal Rules of Civil Procedure, having fixed the date of November 28, 1973 for the commencement of an evidentiary hearing upon said Motion For Approval and, accordingly, notices of said evidentiary hearing, pursuant to Order of Court duly having been mailed, certified mail, return receipt requested, to members of said class and sub-class, and said

matter, on November 28, 1973, having come on for hearing before this Court, evidence having been received, and the Court having heard the statements and arguments of counsel, and the Court being duly and fully advised in the premises, now at the close of all the evidence and statements of counsel does hereby

FIND AND DECREE, that the Settlement Agreement jointly offered by counsel for the class plaintiffs and sub-class plaintiffs and by counsel for the defendant, is fair, reasonable, and adequate as to said class and sub-class plaintiffs and, accordingly, should be, and hereby is, fully approved;

THE COURT DOES FURTHER ORDER AND DIRECT, that a copy of the Settlement Agreement dated as at November 7, 1973 and filed herein on November 8, 1973, as well as the Agreement of Amendment which is attached thereto and made a part thereof, and each of the terms, provisions, covenants and agreements contained therein, be and hereby are incorporated by reference in this said Judgment and made a part hereof, and that the terms and provisions of said Settlement Agreement and Amendment are binding upon the class and sub-class plaintiffs and International and they, and each of them, further are directed and ordered to enter upon performance and execution of said Settlement Agreement in accordance with its terms and provisions at the times and in the manner as in said Settlement Agreement and Agreement of Amendment attached thereto, provided;

THE COURT DOES FURTHER ORDER AND DECREE, that Franchise Agreement, Equipment Lease and Sublease be-

tween each participating current franchisee and International Industries, Inc. (or the franchisor if other than International Industries, Inc.) shall be modified, supplemented and amended, in the form and to the effect of the Amendment which is attached to and made a part of the Settlement Agreement and this Judgment.

THE COURT DOES FURTHER ORDER AND DECREE, that the Preliminary Injunction filed January 6, 1972 against Defendant, International Industries, Inc., shall be dissolved and vacated as of the date upon which this Judgment shall become final.

THE COURT DOES FURTHER ORDER AND DIRECT, that Sheridan Morgan and David Berger, Co-Lead Counsel for the plantiffs, submit to the Court, within fifteen days after the date upon which this Judgment shall become final, a proposed formula for distribution of the $500,000 fund as described in paragraph 11 of the Settlement Agreement among members of the sub-class of former franchisees;

IT IS FURTHER ORDERED AND DECREED, that Sheridan Morgan and the law firm of Morris, Mitchell, Larson, King, Stamper and Bold of Kansas City, Missouri, or David Berger be designated counsel for the class and sub-class plaintiffs herein to receive payment of the stipulated fund for payment of costs and litigation expenses from defendant in the amount of $75,000 as porvided in the "Settlement Agreement" and to make disbursements from said fund as follows: (1) to pay all costs levied by this Court in regard to the class and sub-class actions in this litigation; and (2) to reimburse and

pay the various parties or counsel for litigation expenses incurred or advanced upon proper showing that any such expenditure was for the sole benefit of the class or sub-class or both and that no part thereof was incurred by any person for his individual benefit, or, alternatively, to pay directly such litigation expenses incurred in the prosecution of the class and sub-class actions upon the receipt of itemized and authenticated statements relating to such expenses which shall be certified by any person seeking same as expenses incurred for the class and sub-class at the request of counsel representing the class or sub-class and that a full and complete accounting of all such disbursements be made to this Court; and

IT IS FURTHER ORDERED AND DECREED, that any person or entity disputing any denial or failure to pay a claimed litigation expense by said counsel shall make application to this Court for an allowance thereof and it is further ORDERED, that any funds from said fund of $75,000 which are not paid out for costs presently incurred shall be retained by said counsel pending final disposition of all matters arising from said "Settlement Agreement."

THE COURT DOES FURTHER ORDER AND DECREE, that the following terms and provisions of the Settlement Agreement (that is paragraphs 22, 23, 23A and 24) be set forth in full herein and become and are a part of this said Judgment:

> "22. The Judgment to be entered pursuant to paragraph 7 hereof shall provide, among other things, that it constitutes a full and complete adjudication of those claims of all participating franchisees but only as hereinbelow described; and that said participating franchisees (including

all members of the current and former classes and all franchisees who shall elect to reenter said current class), and all of them, shall and do thereby release and discharge INTERNATIONAL, and each and all of its officers, directors, agents, attorneys and employees, of and from, and that said participating franchisees thereby waive and relinquish, *only* any and all claims, demands, causes of action, defenses, setoffs and counterclaims, obligations, damages and liabilities of any kind and nature whatsoever whether in law or equity, which said participating franchisees, or any of them, ever had, to and including the date of this Settlement Agreement, based upon or arising out of the sale or license of the franchise to operate or the operation or termination of the operation of any franchised International House of Pancakes restaurant; *limited,* however, to the following claims and defenses, and no others:

"(a) Any antitrust claim asserted or alleged or in any manner relating to any matter or thing set forth in any of the pleadings by or on behalf of any participating class member in any of the actions referred to and described in paragraph 1 of this Settlement Agreement.

"(b) Any claim or defense asserted or alleged or claimed by any participating class member to arise and exist under the antitrust laws of the United States or of any state.

"(c) Any claim or defense asserted or alleged or claimed to exist by any franchise, the assertion or maintenance whereof by such franchisee would be barred or precluded by the application (sic) principles of res judicata or collateral estoppel, had the antitrust claims in the actions referred to in paragraph 1 of this Settlement Agreement proceeded to final Judgment on the merits. This release shall not effect claims set forth in the action entitled "Frank Baxter on behalf of himself and all other persons similarly situated versus International Industries, Inc." in the Superior Court of California in and for the County of Alameda Number 426200 and "In the Matter of Arbitration between Frank Baxter on behalf of himself and all other persons similarly situated versus International Indus-

tries, Inc. case number 72 10 0066 73 and/or any other action now pending or hereinafter filed presenting the same claim or claims.

"23. The Judgment to be entered pursuant to paragraph 7 hereof shall further provide as follows:

"(a) That the members of said former class (but not including those persons described in paragraph 8 hereof), and each of them, and each and all of their officers, directors, agents, attorneys and employees, are thereby released and discharged of and from any and all claims, demands, causes of action, obligations, damages and liabilities of any kind and nature whatsoever, whether in law or in equity, which INTERNATIONAL now has, ever had or may hereafter claim to have had, to and including the date of this Settlement Agreement, based upon or arising out of the sale or license of the franchise to operate, or the operation of the termination of the operation of, any franchised International House of Pancakes restaurant. With respect to those persons described and referred to in paragraph 8 hereof, who are deemed to have become members of the former class for the reasons referred to in said paragraph 8, said persons shall have the option either (1) to elect to obtain the benefits of the release afforded to members of the former class hereinabove set forth in this subparagraph (a), and thereby to forego any right to participate in or to receive any portion of the former subclass settlement described in paragraph 11 hereof; or (2) to retain their right to participate in the former subclass settlement and to receive only the benefits of the release hereinafter provided as to members of the current class, as set forth in subparagraphs (b) and (c) above. With respect to each such person who shall elect the option hereinabove referred to in section (1) hereof, the amount of the former subclass settlement shall not be diminished or reduced by the amount of any allocated share that would otherwise be received by any such person, and the full amount of said former subclass settlement shall be allocated to and distributed among the members of said former class and those persons described in paragraph 8

who have elected the option referred to in section (2) hereof.

"(b) That the members of said current class (including those eligible current franchisees who elect to reenter said class), and each of them, are thereby released and discharged of and from any and all claims or rights or alleged claims or rights of INTERNATIONAL to terminate the franchise of any such member by reason of any act or thing (other than and excluding defaults in the payment of money due to INTERNATIONAL) existing or occurring prior to the date of this Settlement Agreement; provided, however, that this release shall not apply to any uncured default or cause for termination existing or occurring subsequent to the date of this Settlement Agreement, regardless of whether same is a new default or cause or is a reoccurrence or a continuation of a default or cause existing or occurring prior to the date of this Settlement Agreement. Nothing herein contained shall be deemed or construed to limit or to affect in any manner the right of INTERNATIONAL to terminate the franchise or any member of said current class by reason of the uncured default in the payment of money due and owing to INTERNATIONAL.

"(c) That the members of said current class, and each of them, and each and all of their officers, directors, agents, attorneys and employees, are thereby released and discharged of and from any and all claims, demands, causes of action, obligations, damages and liabilities of any kind and nature whatsoever, whether in law or in equity, which INTERNATIONAL now has, ever had or may hereafter claim to have had, to and including the date of this Settlement Agreement, based upon or arising out of the sale or license of the franchise to operate, or the operation or the termination of the operation of any franchised International House of Pancakes restaurant; provided, however, that the foregoing release shall not be applicable in respect of those matters hereinabove described in subparagraph (b) hereof; and provided further, however, that such release shall not be applicable to any claim and/or cause of action

for the collection of money and/or for the termination of the franchise of any current class member, which INTERNATIONAL may now have or claim to have or which it may hereafter have or claim to have (including, but not limited to such claims and/or causes of action which may heretofore have been reduced to Judgment or award in arbitration, in respect of the failure or refusal of any member of said current class to pay any monetary obligations to INTERNATIONAL, which may heretofore have become and which may presently be due and owing, under any of the agreements described in paragraph 20 hereof or otherwise, or which may hereafter become due and owing, under any of said agreements (as same shall be hereafter modified, amended and supplemented) or otherwise.

"23A. Notwithstanding the provisions of paragraphs 22 and 23 hereof, INTERNATIONAL and any participating franchisee may, if each and both of them shall mutually so agree, enter into and execute a mutual, general release which shall be broader than those above provided, on the following terms and conditions:

"(a) Any release which is entered into pursuant hereto shall be and become effective *only* if same shall be in writing and shall be duly executed both by such participating franchisee and an authorized officer of INTERNATIONAL, and shall recite that the parties thereto have elected that, as between themselves, their rights and duties shall be governed by this paragraph 23A and not by paragraphs 22 and 23.

"(b) Any release which shall be executed pursuant to this paragraph 23A shall be valid and effective only as between the signatory parties thereto and not as between INTERNATIONAL and any non-signatory parties.

"(c) Each of the signatory parties who shall execute such a release shall thereby release and discharge the other signatory party, and each and all of his or its officers, directors, agents, attorneys and employees, of and from any and all claims, demands, causes of action, defenses, setoffs and counterclaims, obligations, damages and lia-

bilities of any kind or nature whatsoever in law or in equity, which any signatory party ever had or claimed to have against the other signatory party, to and including the date of execution of such release, based upon or arising out of the sale or license of the franchise to operate, or the operation or termination of the operation of, the franchised International House of Pancakes restaurant or restaurants which shall be specified in such release; which release shall not be subject to any of the restrictions or limitations referred to and described in paragraphs 22 and 23 hereof. It shall be the intent and effect of each release if any, executed pursuant to this paragraph 23A that the parties thereto shall have fully settled and compromised, as between themselves, all claims and/or defenses without exception, existing as of the date this Settlement Agreement is approved by the Court; and the release shall extend to and include all such claims, whether known or unknown.

"(d) Any release executed pursuant to this paragraph 23A shall be a document which shall be physically separate and distinct from this Settlement Agreement; and no party hereto shall, by virtue of the execution of this Settlement Agreement, be deemed to have executed such release within the meaning of subparagraph (a) hereof.

"24. In the event that any member of the current class or any member of the former class, or any franchisee who shall have elected to join or to reenter said current class pursuant to paragraph 18 hereof, shall have heretofore filed or joined in an action against INTERNATIONAL, at any time prior to entry of final Judgment, involving any claim asserted or alleged or claimed to arise under the antitrust laws of the United States or of any state, he shall cause such action or his intervention in such action to be dismissed with prejudice immediately upon the Judgment to be entered pursuant to paragraph 7 becoming final."

WILLIAM R. COLLINSON
District Judge

DATED November 29, 1973.

PRIOR OPINION OF THE UNITED STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS
For The Eighth Circuit

No. 73-1574

IN RE:
INTERNATIONAL HOUSE OF PANCAKES FRANCHISE LITIGATION
ROBERT J. HELFENBEIN and CIRCLE INVESTMENTS OF MISSOURI, INC., on behalf of themselves, etc.
Plaintiffs-Appellees,
v.
INTERNATIONAL INDUSTRIES, INC., et al.,
Defendants-Appellants.
ROBERT J. HELFENBEIN and CRESCENT INVESTMENT OF IOWA, INC., on behalf of themselves, etc.
Plaintiffs-Appellees,
v.
INTERNATIONAL INDUSTRIES, INC., et al.,
Defendants-Appellants.
JOE JIMMIE REED, on behalf of himself ,etc.,
Plaintiff-Appellee,
and THOMAS LEE SIMMONS,
Intervenor-Plaintiff-Appellee,
v.
INTERNATIONAL INDUSTRIES, INC.
Defendant-Appellant.
RUDOLF WETH, on behalf of himself, etc.,
Plaintiff-Appellee,
v.
INTERNATIONAL INDUSTRIES, INC.,
Defendant-Appellant.
RICHARD L. ERICKSON,
Plaintiff-Appellee,
v.
INTERNATIONAL INDUSTRIES, INC.,
Defendant-Appellant.

Filed: November 2, 1973

SUPPLEMENTAL ORDER OF SUMMARY AFFIRMANCE

This Court, on September 26, 1973, entered our order summarily affirming an order of the District Court for the Western District of Missouri, The Honorable William R. Collinson. The District Court's order disapproved a proposed settlement agreement between International Industries, Inc., the defendant in a multi-district class action suit alleging violations of the Sherman Anti-Trust Act, and certain of the numerous plaintiffs in the case. The proposed settlement agreement had been actively opposed by a number of the plaintiffs at the hearing on the proposed settlement agreement.

After our order of summary affirmance had been entered, defendant-appellant filed suggestions in opposition to the motion to affirm which had been filed by the plaintiff-appellees in violation of Rule 9(b)[1] of the Rules of the United States Court of Appeals for the Eighth Circuit, in that it was filed prior to the filing of appellant's brief. However, as our order of September 26, 1973, recites, our action of summary affirmance was based as well on Rule 9(a)[2] of the Local Rules,

[1] Rule 9(b) of the Local Rules provides in pertinent part:

> The appellee may file a motion for summary disposition of a docketed appeal. *** A motion to affirm may be based on the ground that the questions presented for review are so unsubstantial as not to need further argument. ***
>
> *** A motion to dismiss on the ground that the appeal is frivilous and entirely without merit or a motion to affirm must be filed within fifteen (15) days after the appellant's brief has been filed, but *may not be filed prior to the filing of appellant's brief.* (emphasis supplied).

[2] Rule 9(a) of the Local Rules provides in pertinent part:

> The Court may at any time, on its own motion and without notice, dispose of an appeal summarily ***. The court may dismiss an appeal that is not within the jurisdiction of the court or that it finds to be frivolous and entirely without merit, or may affirm or reverse when the questions presented do not require further argument.

which provides that the Court upon its own motion may summarily affirm when the questions presented do not require further argument.

To insure that the interests of justice have been served in this appeal, we have carefully considered the suggestions filed in opposition to summary affirmance. Upon review of the record and the suggestions, we conclude that there is no clear showing that the trial court was guilty of an abuse of discretion in refusing to approve the proposed settlement. This is the standard of review we apply to an appeal of the approval or disapproval of a proposed settlement. *See, United Founders Life Ins. Co. v. Consumers Nat. Life Ins. Co.*, 447 F.2d 647, 655 (7th Cir. 1971); *West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1085 (2d Cir.), *cert. denied sub nom., Cotler Drugs Inc. v. Chas Pfizer & Co.*, 404 U.S. 871 (1971).

In view of the fact that members of the plaintiff class opposed the settlement and that it would continue in effect the very provisions of the franchise agreement challenged as violative of the anti-trust laws, we think Judge Collinson properly exercised his discretion in disapproving the settlement. Our Order of Summary Affirmance filed September 26, 1973, pursuant to Local Rule 9(a) was correct and will not be disturbed.

This supplemental order, after consideration of appellant's suggestions and contentions, reaffirms our prior order summarily dismissing the appeal and affirming the order of the District Court disapproving the proposed settlement.

PRIOR OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

IN RE:
INTERNATIONAL HOUSE OF PANCAKES
FRANCHISE LITIGATION

M.D.L. DOCKET NO. 77
ALL CASES

MEMORANDUM OPINION AND ORDER

This opinion deals solely with a proposed settlement of the class action involved in this multidistrict litigation. Of necessity, this memorandum is written in broad and general terms, ignoring a multitude of details which the Court feels need not be discussed in making this decision. To illustrate, the proposed settlement (which of necessity disposes of these details) consists of twenty-five typed sheets to which is attached forty-nine pages of proposed amendments to the existing franchise agreements between plaintiffs and defendants.

This class action is an anti-trust suit by a class consisting of the present franchise holders who operate International House of Pancake restaurants in various localities scattered over the entire country, against the franchisor. A separate class of former franchise holders is also in the suit.

Basically, the plaintiffs allege that certain privisions of the franchise agreement constitute "tie-in sales" and seek damages for past payments under these provisions and injunctive relief

against future enforcement of them by defendants. The principal provisions attacked are the so-called "management fee" (varying from 5% to 6.2% of franchisee's gross receipts) and the equipment lease provisions (roughly $280.00 per week for five years, $190.00 per week for the next ten years, and $160.00 per week for the remaining five years of the agreement).

There has been a tremendous amount of discovery in this case, counsel working diligently against deadlines set by the Court. This discovery has resulted in plaintiff's counsel coming to the unpleasant conclusion that, due to the financial condition of the defendant, any substantial monetary judgment that might be recovered would be uncollectible, and would only result in bankruptcy of the defendant. It is quite frankly admitted by plaintiff's counsel that this precarious financial condition of the defendant is the sole reason they have agreed to and submitted the proposed settlement to the Court for approval.

Out of nearly four hundred existing franchisees, approximately two hundred and seventy-five are members of this class of present franchisees whose claims would be settled if the Court approves the settlement. Some of the remaining franchisees have their separate anti-trust actions pending, and the remainder "opted out" of the class. Each of these franchisees owns and operates a business which involves a substantial investment (the franchises alone cost $50,000 to $60,000). The minimum payments of any franchisee under the "management fee" and "equipment lease" provisions mentioned exceed $30,000 per year, and many pay much in excess of that amount.

The evidence at the hotly contested hearing in the proposed settlement disclosed that the defendant is so deeply in debt that the estimated Ten to Eleven Million Dollars it will receive this fiscal year from its franchises will still leave it with a *negative* cash flow of One to Two Million Dollars. The payments received from the franchisees are pledged under security agreements to defendant's creditors. For this reason they were not subject to modification in the settlement negotiations, and remain unchanged in the proposed settlement.

If this Court approved this proposed settlement, it would give judicial approval to the exact provisions of these franchise agreements, which plaintiffs have vigorously contended violated the anti-trust laws, and which were, unquestionably, the only provisions of the franchises which involved sufficient sums of money to inspire anticipation of a large monetary recovery in the cases.

In addition, the members of this class would be bound, by judicial decree, to continue making those payments for the balance of a twenty-year lease (in most cases at least fifteen years), whereas the franchisees who are not in the class would be free to seek injunctive relief against continued payments.

In fact, the many franchisees who flew to Kansas City, with their attorneys, to oppose the proposed settlement, all empnaszied that they were much more interested in injunctive relief than any judgment for damages.

This Court can fully understand that the attorneys for the class, who have labored long, diligently, and skillfully to pre-

pare this action for trial, are faced with an unfortunate situation. However, two attorneys for the plaintiffs, who have worked continuously in the discovery proceedings, testified under oath that they did not believe the proposed settlement was fair to the members of the class, stating their reasons. The Court has to give considerable weight to this serious, considered opinion of these two officers of this Court.

Without detailing the many provisions of the proposed settlement, and the arguments strenuously urged in favor of it, and without doubting in any way the sincerity of those arguments, this Court cannot approve this settlement. Lumping together all of the other franchise provisions which the franchisor offers to amend in this settlement, and the small credit, in lieu of damages, which the franchisees will receive over a number of years under the settlement, they are insignificant to the class members who seek relief from the two provisions of the franchise agreement which now cost them an average of $50,000 a year each, and which their lawyers advise them violate the law of the land. Certainly, they are entitled to their day in court on this vital issue, and this Court will not foreclose them by approval of this settlement.

The Court is setting, by this order, a pretrial conference in the Court's Chambers at Kansas City, Missouri, on Friday, July 20, 1973, at 10:00 a.m. Counsel for plaintiffs and defendants in the class action are directed to be present. The principal matter on the agenda will be the setting of a trial date for the class action. Counsel may submit proposed additions to the agenda in writing prior to that date, with due

service on opposing counsel. All counsel of record in the class action are welcome to attend.

ORDERED that the proposed settlement agreement of the class action in this litigation heretofore filed with this Court be, and is hereby, disapproved.

WILLIAM R. COLLINSON

District Judge

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IN THE

Supreme Court of the United States

October Term, 1975.

No. 75-27.

ABRAHAM GRUNIN,

Petitioner,

v.

INTERNATIONAL HOUSE OF PANCAKES, a Division of INTERNATIONAL INDUSTRIES, INC. and FRANCHISEE CLASS and SUB-CLASS MEMBERS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF FOR RESPONDENT FRANCHISEE CLASS AND SUB-CLASS MEMBERS IN OPPOSITION.

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INDEX.

	Page
OPINIONS BELOW	1
JURISDICTION	3
QUESTIONS PRESENTED	3
STATEMENT OF THE CASE	4
ARGUMENT	7
The Decision Below Was Correct and Presents No Important Federal Question	7
A. The Decision of the Court of Appeals Applies Established Principles Governing Notice to Class Members and Raises No Question Justifying Issuance of a Writ of Certiorari	7
B. The Court of Appeals Correctly Applied Established Standards of Review in Affirming the District Court's Approval of the Class Action Settlement	15
CONCLUSION	22
SUPPLEMENTAL APPENDIX:	
Order Filed December 6, 1973	A47
Order Awarding Attorney Fees Filed February 1, 1974	A49

TABLE OF CASES CITED.

Page

Ace Heating & Plumbing Co. v. Crane Co., 453 F. 2d 30 (3rd Cir. 1971) 16

Air Lines Stewards v. American Airlines, Inc., 455 F. 2d 101 (7th Cir. 1972) 13

Carroll v. Dorsey, 20 Howard 204, 15 L. Ed. 803 (1858) 8

City of Detroit v. Grinnell Corporation, 495 F. 2d 448 (2d Cir. 1974) 16, 18, 19

Chaffee v. Hayward, 20 Howard 208, 15 L. Ed. 804 (1858) .. 8

Cohen v. Young, 127 F. 2d 721 (6th Cir. 1942), cert. denied 321 U. S. 778 (1944) 16

Connecticut Ry. & Lighting Co. v. New York, N. H. & H. R. Co., 190 F. 2d 305 (2d Cir. 1951) 16

Ellis v. Dixon, 349 U. S. 458, 75 S. Ct. 850 (1955) 20, 22

Eisen v. Carlisle & Jacquelin, 417 U. S. 134, 94 S. Ct. 2140 (1974) 14

Feder v. Harrington, 58 F. R. D. 171 (S. D. N. Y. 1972) 15

Florida Trailer & Equipment Co. v. Deal, 284 F. 2d 567 (5th Cir. 1960) 16, 17, 18

Greenfield v. Villager Industries, 483 F. 2d 824 (3rd Cir. 1973) 11, 12

In Re International House of Pancakes Litigation, 331 F. Supp. 566 4

In re Prudence Co., 98 F. 2d 559 (2d Cir. 1938) 16

Johnson v. Waters, 111 U. S. 640, 4 S. Ct. 619 (1884) 8

Lamb v. United Security Company, 59 F. R. D. 25 (S. D. Iowa 1972) 14

Levin v. Mississippi River Corp., 59 F. R. D. 353 (S. D. N. Y. 1973) affirmed sub nom., Wesson v. Mississippi River Corp., 486 F. 2d 1398 (2nd Cir. 1973) cert. den., 414 U. S. 1112 (1973) 12

Masterson v. Pergament, 203 F. 2d 315 (6th Cir. 1953) cert. denied, 346 U. S. 832 (1953) 16

TABLE OF CASES CITED (Continued).

Page

Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306, 70 S. Ct. 652 (1950) 11, 14

Newman v. Stein, 464 F. 2d 689 (2d Cir. 1972) 16

Norman v. McKee, 431 F. 2d 769 (9th Cir. 1970), cert. denied, 401 U. S. 912 (1971) 16

Percodoni v. Riker-Maxson Corp., 50 F. R. D. 473 (S. D. N. Y. 1970), aff'd per curiam sub nom. Farber v. Riker-Maxson Corp., 442 F. 2d 457 (2d Cir. 1971) 18

Pfizer, Inc. v. Lord, 456 F. 2d 532 (8th Cir. 1972), cert. den., 406 U. S. 976 17

Philadelphia Housing Auth. v. American R. & S. Sanitary Corp., 323 F. Supp. 364 (E. D. Pa. 1970) 12

Sylvan Birch Inc. v. Koch, 140 F. 2d 852, 861 (8th Cir. 1944) 20

United Founders Life Ins. Co. v. Consumers National Life Insurance Co., 447 F. 2d 647 (7th Cir. 1971) 12, 16

Upson v. Otis, 155 F. 2d 606 (2d Cir. 1946) 16

Weight Watchers of Philadelphia, Inc. v. Weight Watchers Int'l, Inc., 455 F. 2d 770 (2d Cir. 1972) 16

West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710 (S.D. N. Y. 1970) affirmed 440 F. 2d 1079 (2nd Cir. 1971) cert. den. sub nom., Cotler Drugs, Inc. v. Chas. Pfizer & Co., Inc., 404 U. S. 871, 92 S. Ct. 81 (1971) 12, 13, 15, 16, 18

Williams v. First Nat. Bank of Pauls Valley, 216 U. S. 582 (1909) 17

Young v. Katz, 447 F. 2d 431 (5th Cir. 1971) 16, 18, 19

TABLE OF STATUTES AND AUTHORITIES.

	Page
Clayton Act, 15 U. S. C. § 14, Section 3	5
Federal Rules of Civil Procedure:	
Rule 23	3, 4, 8, 18
Rule 23(c)(2)	14
Rule 23(e)	12, 13, 15
Haudek, The Settlement and Dismissal of Stockholders' Actions—Part II, 23 Sw. L. J. 765, 793 (1969)	17
Manual for Complex Litigation as amended to January 1, 1973	13
Sherman Act, 15 U. S. C. 881 and 2:	
Section 1	5, 19
Section 2	5
Supreme Court Rule 23.4	20

IN THE

Supreme Court of the United States

—

OCTOBER TERM, 1975.

—

No. 75-27.

—

ABRAHAM GRUNIN,

Petitioner,

v.

INTERNATIONAL HOUSE OF PANCAKES, A DIVISION OF INTERNATIONAL INDUSTRIES, INC. AND FRANCHISEE CLASS AND SUB-CLASS MEMBERS,

Respondents.

—

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

—

BRIEF FOR RESPONDENT FRANCHISEE CLASS AND SUB-CLASS MEMBERS IN OPPOSITION.

———

OPINIONS BELOW.

The citation to the Opinion of the United States Court of Appeals for the Eighth Circuit, to which this Petition is directed, is adequately set forth in the Petition (Pet. 2). It is printed in the Appendix to the Petition (Pet. A-1 to A-26). The judgment of the District Court approving the Settlement Agreement which was appealed to the Court of Appeals was without Opinion and not reported. It is printed in the Appendix to the Petition (Pet. A-30 to A-38). The Order awarding attorneys' fees in the aggregate and the fund for reimbursement of costs is without

opinion and is not officially reported (R. A. 732, 733). It is printed in the Supplemental Appendix attached to this brief (A-47 to A-48). The Order of the District Court allocating fees among the various attorneys for the class and for individual franchisees is not officially reported (R. A. 1316-1324). It is printed in the Supplemental Appendix to this brief (A-49 to A-57).

The prior Opinion of the United States Court of Appeals for the Eighth Circuit and the Opinion of the United States District Court concerning the prior proposed settlement in this litigation are adequately cited but inaccurately characterized in the Petition (Pet. 2). The earlier settlement was not almost identical to the settlement here under review.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition (Pet. 2).

QUESTIONS PRESENTED.

The Petitioner has submitted a list of five questions presented for review (Pet. 2, 3). Regrettably, the questions, as presented, distort the decision of the Court below, raise issues never presented to that Court or to the District Court, and inaccurately represent certain facts of record, all of which will become apparent in subsequent portions of this brief.

The decision of the Court below presents the following questions:

1. Whether the Court of Appeals erred in concluding that the timing, content and manner of transmission of notice from the District Court of a proposed settlement in class litigation and hearing thereon to Class and Sub-Class Members did not violate the requirements of Rule 23 and the dictates of due process.

2. Whether the Court of Appeals erred in concluding that the District Court did not abuse its discretion in determining that the proposed settlement in this class litigation was fair, reasonable and adequate, in approving the proposed settlement and in entering judgment thereon.

STATEMENT OF THE CASE.

Petitioner, a current franchise operator of Respondent, International House of Pancakes, a Division of International Industries, Inc. (hereinafter "IHOP"), and a member of the current franchisee class in the instant litigation, is the sole objector to a settlement negotiated with IHOP, on behalf of the 310 members of the class of current franchisees and subclass of former franchisees. Because of Petitioner's objection, the members of the class and subclass, and also other IHOP franchisees who are eligible to re-enter the class, have been deprived of the substantial benefits of the settlement for more than 1½ years. This brief is submitted in behalf of the members of the class and subclass, Respondents herein. It is understood that Respondent IHOP will similarly oppose the Petition.

As a result of certain inaccuracies, omissions, and improper inferences contained in Petitioner's Statement of Facts, Respondent finds it necessary to make a brief additional statement.

Subsequent to the transfer to the United States District Court for the Western District of Missouri by the Judicial Panel on Multidistrict Litigation of nine pending actions by franchisees and former franchisees of IHOP (*In Re: International House of Pancakes Litigation*, 331 F. Supp. 566), the District Court ordered that these actions be maintained as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure. The Court's Order, dated October 26, 1971, certified a class composed of current franchisees of IHOP and a subclass composed of former franchisees (R. A. 125-127). Notice of the action was mailed to the class of current franchisees November 19, 1971 (Docket Entries pg. 9) and to the subclass of former franchisees February 24, 1972 (Docket Entries pg. 13).

The Complaints in these cases sought treble damages, injunctive relief and attorneys' fees from IHOP for alleged violations of Sections 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1 and 2 and Section 3 of the Clayton Act, 15 U. S. C. § 14. As the case developed, counsel focused primarily on the alleged Sherman 1 "tying" of necessary goods and services to the IHOP trademark.

Following extensive discovery (R. A. 283) and intensive negotiations (R. A. 275-280, 1071, 1072), the parties entered into the proposed Settlement Agreement dated March 19, 1973 (R. A. 292-395). Pursuant to Order of the District Court (R. A. 128), notice of hearing on the proposed settlement was mailed to the members of the class of current franchisees and to the members of the subclass of former franchisees on April 24, 1973 (R. A. 129-136). Hearing was held on June 1 and 2, 1973. Numerous objectors were present at the hearings including Petitioner in person and by counsel. By Order dated July 12, 1973, the District Court disapproved the proposed settlement primarily because there was no relief granted in the area of the equipment leases. That Order was summarily affirmed by the Court of Appeals for the Eighth Circuit on September 26, 1973, and reaffirmed in an Order dated November 2, 1973 (A-39 to A-41).

Further settlement negotiations were held culminating in a proposed Settlement Agreement dated November 7, 1973 which provided substantial beneficial revisions which met the objections of the District Court and the Court of Appeals in the first settlement. Therefore, contrary to petitioner's statement there was a substantial difference between the first and second settlement (R. A. 438-556).

A joint Motion for approval of that settlement was filed November 8, 1973 (R. A. 557, 558) and on that date, the District Court issued an Order and a Pretrial Order

approving notices to the class and subclass members of a hearing to be held on November 28, 1973 (R. A. 559-562). The notices were mailed on November 9, 1973 (R. A. 569, 573). Hearing was held November 28 and 29, 1973. Again, Petitioner appeared in person and by counsel as did many of those objectors who had appeared at the June hearing. At this hearing only Petitioner indicated objection to the proposed settlement. Petitioner did not state the reasons therefore nor did he challenge in any respect the notice of hearing or ask for a continuance of the hearing. Petitioner's counsel cross-examined witnesses who testified in support of the settlement and introduced two inconsequential exhibits (R. A. 1081-1083, 1312, 1314). Petitioner produced no witnesses of his own. At the conclusion of the hearing, the Court stated from the bench, it would enter an Order approving the settlement that day (R. A. 1086). The judgment was so entered (A-30 to A-38).

Immediately following hearing on the proposed settlement, the District Court began an evidentiary hearing on the fee petitions of the attorneys for the class and the individual franchisees. This hearing continued through November 30, 1973. Counsel for Petitioner filed a fee application and testified at the hearing (R. A. 706-709, 1242-1244).

By Order dated December 6, 1973, the District Court awarded $1,250,000.00 in the aggregate for attorneys' fees to counsel representing the class and certain counsel representing individual franchisees, stating that the allocation of fees among counsel would be subject to further Order of the Court (A-47). Subsequently, on February 1, 1974, the District Court entered an Order allocating the attorneys' fees among the various counsel (A-49 to A-57).

ARGUMENT.

The Decision Below Was Correct and Presents No Important Federal Question.

Stripped of all the Petition's inaccuracies, irrelevancies, diatribes and extra record speculation, Petitioner is really seeking to have this Court review the exercise of discretion by the District Court, which exercise has been reviewed and affirmed by the Court of Appeals in two separate areas where both Courts applied well-established principles of law:

1. The adequacy of notice to class members of hearing on a proposed settlement of class litigation; and

2. The fairness, reasonableness and adequacy of the settlement itself.

Viewed in proper context, it becomes abundantly clear that Petitioner seeks to involve this Court in a detailed review of factual issues which involve neither important federal questions nor conflicts among the circuits. There is no dispute with regard to the applicable principles of law. The decision of the Court of Appeals was eminently correct, fully in accord with all of the applicable precedents, and raises no issues warranting review by this Court.

A. The Decision of the Court of Appeals Applies Established Principles Governing Notice to Class Members and Raises No Question Justifying Issuance of a Writ of Certiorari.

Petitioner asserts that the notices with respect to the proposed settlement were in direct violation of due process

of law and Rule 23 of the Federal Rules of Civil Procedure in that (1) the time allowed between the mailing of the notices and the date of the hearing (19 days) was too short; (2) the contents of the notices were deficient in that they contained misrepresentations of fact, misleading constructions of contractual provisions and self-serving legal conclusions; and (3) the means of transmittal of the notices were not reasonably designed to reach all class members.

Most significant with regard to these contentions is that Petitioner appeared at the November 28th hearing in person and through counsel. At that time, there was expressed no objection with regard to the timing, content, or manner of transmittal of the notices, nor was a continuance of the hearing requested. As the Court of Appeals very appropriately pointed out:

> "If counsel had brought these objections to the attention of the Court at that time or had sought a continuance, the expressed need for appellate relief on these grounds might well have been eliminated." (A-12).

This Court long ago held that objections on appeal as to notice, when appearance was made in the trial court and no objections raised therein as to notice, were not well taken. *Carroll v. Dorsey,* 20 Howard 204, 15 L. Ed. 803 (1858); *Chaffee v. Hayward,* 20 Howard 208, 15 L. Ed. 804 (1858); *Johnson v. Waters,* 111 U. S. 640, 673, 4 S. Ct. 619, 637 (1884). The words of Chief Justice Taney in the *Chaffee* decision are particularly appropriate:

> "But if the defendant does not, by motion at the first term, apprise him of the irregularity of his proceeding in this respect, and of his intention to take advantage of it, the plaintiff is put off his guard by the defend-

> ant's appearance; and if motion is permitted at the second term, he will be delayed an entire year in the prosecution of his suit, whenever it is in the interest of a defendant in error to delay and harass his adversary."

Petitioner should not be permitted to turn an afterthought into an unfair burden and further delay which respondents, constituting all of the subclass and all other members of the class herein, must bear.

In order to demonstrate the fallacy of Petitioner's contentions with regard to the timing of the notice, it is necessary to review the factual circumstances surrounding the mailing of the notice, just as did the Court of Appeals. In particular, Petitioner has inaccurately represented that there were only nine (9) days from the mailing of notice for a class member to object to the proposed class settlement (Pet. 2). There were, in fact, nineteen (19) days. The Notices were mailed November 9, 1973 and the hearing was held November 28, 1973.

Petitioner agrees that the Notices were mailed November 9, 1973 and the hearing held November 28, 1973. Petitioner cites the District Court's Pretrial Order stating that class members who desired to object to the settlement and have an attorney represent him were to have that attorney file a written Entry of Appearance with the Court on or before Friday, November 23, 1973 (R. A. 560-562). Petitioner argues that between November 9, 1973 and November 23, 1973 were two weekends and one holiday thereby reducing the period to 9 days. However, the November 23, 1973 appearance requirement of the District Court was not enforced. Petitioner's attorney himself filed an Entry of Appearance, dated November 27, 1973, (R. A. 577) on November 28, 1973, the day the hearing began (R. A. 7). Petitioner's counsel was permitted to appear

at the hearing to present witnesses and offer argument as he desired. In fact, Petitioner's counsel participated in the hearing. Thus, contrary to Petitioner's assertions, there were, in fact, 19 days within which to react to the Notice.

In addition, no review of the "due process" elements of the notice would be complete without considering the abortive June 1st settlement proceedings. Prior to that proceeding notice had been mailed to the class and subclass members on April 24, 1973 (R. A. 135-136). The notice was accompanied by a complete copy of the Settlement Agreement and a copy of the numerous revisions to the franchise agreements, which had been negotiated on behalf of the class members (R. A. 135-136). At the hearing on June 1st and 2nd numerous objectors appeared, represented by counsel, and vigorously asserted their position. Among those objectors were Petitioner and his counsel. Subsequent to the Court's disapproval of that settlement on July 12, 1973 (A-42 to A-46), class counsel kept advised those counsel who had appeared at the June hearings of the progress of negotiations (R. A. 1340-1347).

The November 9th notice with regard to the November hearing did not include a copy of the Settlement Agreement or the proposed franchise agreement amendments. This was unnecessary. The notice advised that: "the amendments to the franchise documents previously embodied in the earlier settlement proposal have all been retained in the new Settlement Agreement. In addition thereto, a substantial number of further amendments, of substantial monetary value to the franchisees, are presently provided." (R. A. 566). There was in the notice a summary of the additional amendments along with the very significant portions of the Settlement Agreement relating to options on the equipment leases (R. A. 563-569) which were entirely new and not embodied in the previous Set-

tlement Agreement. These were the benefits which met the objections to the first settlement of the Courts below. Thus, counsel for the objectors, including Petitioner, were kept fully advised of all events and developments as they occurred in the negotiations from June 1, 1973 through the date of the hearing. Viewed in this context, it is inconceivable that the Petitioner could argue that he had insufficient time and/or information to prepare for the November hearing.

Petitioner places substantial reliance upon *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306, 70 S. Ct. 652 (1950) and *Greenfield v. Villager Industries*, 483 F. 2d 824 (3rd Cir. 1973). In both cases, different from the case at bar, objection was made with regard to the alleged failure of the notice to meet due process requirements at the trial court level. In the *Mullane* case, this Court stated:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. (Citations omitted.)
>
> "The Notice must be of such nature as reasonably to convey the required information, *Grannis v. Ordean* (234 U. S. 385, 34 S. Ct. 779, 58 L. Ed. 1363) and it must afford a reasonable time for those interested to make their appearance. (Citations omitted.)
>
> "But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met and constitutional requirements are satisfied." (pp. 314, 315).

The Court of Appeals for the Third Circuit in *Villager, supra,* applied these principles and found the notice in violation of the due process requirements. The Court of Appeals for the Eighth Circuit in the case *sub judice* applied the same principles to the three-pronged attack asserted by Petitioner upon the Notice (timeliness, content and transmission) and found, in effect, that "with due regard for the practicalities and peculiarities of the case" the notice met the requirements of due process and Rule 23(e) of the Federal Rules of Civil Procedure. Rather than adopt a "continuing notice" theory as Petitioner suggests (Pet. 10), the Court below viewed the timing and content of the notice in light of all the surrounding circumstances.

The attack by Petitioner on the fairness or content of the notice seems to be over the choice of language or a semantic exercise to determine that alternative descriptions or words or more detail was desirable under the circumstances and, in fact, was required by the standards of due process. Respondents meet such contentions by reference to a number of cases where less than complete detail has been provided and approved by the courts in complex class action matters. *United Founders Life Ins. Co. v. Consumers National Life Insurance Co.,* 447 F. 2d 647, 654 (7th Cir. 1971); *Levin v. Mississippi River Corp.,* 59 F. R. D. 353, 372-373 (S. D. N. Y. 1973) affirmed *sub nom., Wesson v. Mississippi River Corp.,* 486 F. 2d 1398 (2nd Cir. 1973) *cert. den.,* 414 U. S. 1112 (1973); *Philadelphia Housing Auth. v. American R. & S. Sanitary Corp.,* 323 F. Supp. 364 (E. D. Pa. 1970); and *West Virginia v. Chas. Pfizer & Co.,* 314 F. Supp. 710 (S. D. N. Y. 1970) affirmed 440 F. 2d 1079 (2nd Cir. 1971) *cert. den. sub nom., Cotler Drugs, Inc. v. Chas. Pfizer & Co., Inc.,* 404 U. S. 871, 92 S. Ct. 81 (1971).

The notices of the proposed settlement and the hearing, were modeled upon and adapted from the forms of such notices approved and recommended by the Board of Editors of the *Manual for Complex Litigation* as amended to January 1, 1973. The forms of notice approved and recommended in the *Manual* are, in turn, those actually used in connection with the class action settlement in the Antibiotic Drug cases, *West Virginia v. Chas. Pfizer & Co., Inc., supra.* Rule 23(e) of the Federal Rules of Civil Procedure, imposes no specific requirements as to either the timing or the form of the requisite notice but provides simply that notice of the proposed settlement shall be given "in such manner as the Court directs". A determination by the District Court with respect to the adequacy of the notice, may, of course, be overturned upon Appeal only upon a clear showing of abuse of that "virtually complete discretion". If sufficient time is allowed for objectors formally to present their objections, and so long as the notice fairly describes the basic terms of the settlement, and the options open to class members, "with a due regard to the practicalities and peculiarities of the case," the requirements of Rule 23(e) and the demands of due process have been fairly satisfied. *Air Lines Stewards v. American Airlines, Inc.,* 455 F. 2d 101, 108 (7th Cir. 1972). The above-stated Rules with respect to notice in class action cases were scrupulously followed by counsel for Respondents herein and judicially determined to be fair, reasonable and within the bounds of due process of law by the District Court and the Court of Appeals.

Petitioner has chosen to attack the method of transmittal of the notice, i.e., mailed notice to last known address of all class members, arguing that such notice in reality amounted to a mere gesture on the part of the Respondents. However, this is the very type of notice

suggested by the Court in *Mullane v. Central Hanover Bank & Trust Company, supra* and, more recently, by the Court in *Eisen v. Carlisle & Jacquelin*, 417 U. S. 134, 94 S. Ct. 2140 (1974). The Petitioner neither disputes that the mailings were made to the last known addresses of class and subclass members, nor does he suggest any alternative method of notice which would be more reasonable and probable of success. The facts here dictate against publication because of the (1) relatively few members of the class and subclass, (2) widely scattered last known addresses from coast to coast of class and subclass members, (3) inability to determine any special characteristics of the class as a whole other than their common involvement in the franchise restaurant business at one time, and, (4) the high mobility of persons in this country.

The Petitioner cites what he terms the "monitoring provisions" in *Lamb v. United Security Company,* 59 F. R. D. 25 (S. D. Iowa 1972). That case was a shareholder derivative action where original notice to the class to determine participation was required by Rule 23(c)(2) of the Federal Rules of Civil Procedure. The District Court directed notice by direct mail, to the last known addresses of the class members. The Court further expressed a desire to examine the results of the notice actually sent before deciding whether additional kinds of notice were required. The *Lamb* Court citing the *Mullane* decision held that the dictates of due process required that the means to transmit notice "must not be less likely to inform than other feasible substitutes" (page 42). Here, as has been pointed out, the only possible alternative would be publication but the chance of such publication reaching a significant number of class members not reached by mail would be infinitesimal in view of the circumstances and the nature of the class.

The Constitution requires fair play in the dissemination of letters to persons whose whereabouts are unknown but does not require absolute perfection. Notice required in this case by Rule 23(e) of the Federal Rules of Civil Procedure is that which is directed by the District Court and includes the discretionary right to pick among alternatives as long as the notice is reasonably and fairly calculated to reach class members.

Whether the notice of settlement was timely, sufficient or reasonably designed to locate class members is a question, the resolution of which must turn upon the particular facts and circumstances of the individual case, having due regard to the fact that both the timing and the content, as well as the manner of delivery of such notices are matters as to which the District Court has very broad discretionary authority, *West Virginia v. Chas. Pfizer & Co., supra; Feder v. Harrington*, 58 F. R. D. 171 (S. D. N. Y. 1972). The particular facts and circumstances of this case clearly demonstrate that the District Court did not abuse its discretion in establishing the timing, form, content or method of delivery of the notice ordered by it and the Court of Appeals was correct in affirming that determination. The foregoing issues present no important federal questions and do not represent any conflict among the circuits. They represent solely, the application of established rules of law to a specific factual situation and do not warrant the granting of the instant Petition.

B. The Court of Appeals Correctly Applied Established Standards of Review in Affirming the District Court's Approval of the Class Action Settlement.

The remaining points raised by Petitioner are considered in this section of Respondents' Brief as each of

them relates to the standard of review an appellate court must apply to the review of a judicially approved class action settlement.

The standard of review of class action settlements is well-established and consistent throughout the various Circuits, that an appellate court should intervene only when the objector has clearly shown the District Court has abused its discretion. *City of Detroit v. Grinnell Corporation,* 495 F. 2d 448 (2d Cir. 1974); *Newman v. Stein,* 464 F. 2d 689 (2d Cir. 1972); *State of West Virginia v. Chas. Pfizer & Co.,* 440 F. 2d 1079 (2d Cir. 1971); *cert. denied,* 404 U. S. 871 (1971); *Ace Heating & Plumbing Co. v. Crane Co.,* 453 F. 2d 30 (3rd Cir. 1971); *United Founders Life Ins. Co. v. Consumers Nat. Life Ins. Co.,* 447 F. 2d 647 (7th Cir. 1971); *Young v. Katz,* 447 F. 2d 431 (5th Cir. 1971).

The abuse of discretion test also has been applied to settlements in shareholder derivative suits and bankruptcy reorganization proceedings. See *Norman v. McKee,* 431 F. 2d 769 (9th Cir. 1970), *cert. denied,* 401 U. S. 912 (1971); *Florida Trailer & Equipment Co. v. Deal,* 284 F. 2d 567 (5th Cir. 1960); *Masterson v. Pergament,* 203 F. 2d 315 (6th Cir. 1953) *cert. denied,* 346 U. S. 832 (1953); *Connecticut Ry. & Lighting Co. v. New York, N. H. & H. R. Co.,* 190 F. 2d 305 (2d Cir. 1951); *Upson v. Otis,* 155 F. 2d 606 (2d Cir. 1946); *Cohen v. Young,* 127 F. 2d 721 (6th Cir. 1942), *cert. denied* 321 U. S. 778 (1944); *In re Prudence Co.,* 98 F. 2d 559 (2d Cir. 1938).

The strong public policy in favor of settlements requires that opposition to them should be made difficult, especially at the appellate level. See *Newman v. Stein,* 464 F. 2d 689, 692 n. 7 (2d Cir. 1972); *Weight Watchers of Philadelphia, Inc. v. Weight Watchers Int'l, Inc.,* 455 F. 2d 770, 773 (2d Cir. 1972) (dictum). As stated by

the Fifth Circuit in *Florida Trailer & Equipment Co. v. Deal*, 284 F. 2d 567, 571 (5th Cir. 1960): "[T]he very uncertainties of outcome in litigation, as well as the avoidance of wasteful litigation and expense, lay behind the Congressional infusion of power to compromise. This is a recognition of the policy of law generally to encourage settlements." Accord, *Pfizer, Inc. v. Lord*, 456 F. 2d 532 (8th Cir. 1972), *cert. den.*, 406 U. S. 976. See also *Williams v. First Nat. Bank of Pauls Valley*, 216 U. S. 582 (1909); Haudek, The Settlement and Dismissal of Stockholders' Actions—Part II, 23 Sw. L. J. 765, 793 (1969).

The Petitioner grossly misconceives the function of this Court, the Court of Appeals, the District Court and the nature of the proceedings from which this appeal was taken. Petitioner views these proceedings as in the nature of an appeal from the granting of a motion for summary judgment. This is best illustrated by the statements of Petitioner's Counsel in open Court at a hearing on January 31, 1974 (subsequent to the District Court's approval of the settlement), that:

> "Our appeal can decide without benefit of a formal trial that as a matter of law, that illegal ties, particularly with the equipment lease and the flour, and just two examples, are as a matter of law illegal ties under Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act, so that there would not have to be a trial of this matter ultimately." (R. A. 1361).

Counsel for Petitioner later in the same proceeding reasserted this proposition (R. A. 1363). This is not a summary judgment situation. The District Court has approved a compromise settlement of class litigation. It is clear beyond cavil that:

> "neither the trial court in approving the settlement nor this Court in reviewing the approval have the

> right or the duty to reach any ultimate conclusions on the issues of fact and law which underlie the merits of the dispute." *City of Detroit, supra,* at p. 456.

As stated in *Young v. Katz,* 447 F. 2d 431, 433 (3d Cir. 1971):

> "In examining a proposed compromise for approval or disapproval * * * the court does not try the case. The very purpose of compromise is to avoid the delay and expense of such a trial."

See also *West Virginia v. Chas. Pfizer & Co.,* 440 F. 2d 1079, 1086; *Florida Trailer and Equipment Co. v. Deal,* 284 F. 2d 567, 571 (5th Cir. 1960); *Percodoni v. Riker-Maxson Corp.,* 50 F. R. D. 473, 477 (S. D. N. Y. 1970), *aff'd per curiam sub nom. Farber v. Riker-Maxson Corp.,* 442 F. 2d 457 (2d Cir. 1971).

The testing standard of a Rule 23 compromise is set forth in *Young v. Katz,* 447 F. 2d 431, 433 (5th Cir. 1971), as:

> "The very purpose of compromise is to avoid the delay and expense of such a trial. The Court seeks only the answers to two inquiries: (a) whether there is any fraud or collusion in arriving at the compromise and (b) whether the compromise is fair, adequate and reasonable, or, to use an alternative formulation, whether it is for the best interests of (those) whose claims are being given up."

See also *State of West Virginia v. Chas. Pfizer and Co., supra* at p. 1085 where the Court of Appeals for the Second Circuit affirms the "fair, reasonable and adequate" standard for the evaluation of class action settlements.

There is no indication anywhere in the record, nor was it contended in the Court of Appeals that there was any fraud or collusion in arriving at the compromise (R. A. 275-280, 1071-1072).

In the case at bar, the District Court applied the applicable standards. The Court of Appeals reviewed this determination in accordance with the applicable precedents and found the District Court had not abused its discretion (A-12). There is no dispute among the parties with regard to the applicable standards and precedents. The only dispute is grounded upon the application of those standards and precedents to the facts of this case. Simply put, this does not present a federal question nor a conflict among the circuits justifying or even suggesting the issuance of a Writ of Certiorari.

The issues raised by Petitioner in his points 2 and 3 to the effect that the settlement agreement contains an illegal tying agreement in violation of Section 1 of the Sherman Antitrust Act (15 U. S. C. § 1) and that the Court of Appeals failed to consider whether "coercion" is an element of an illegal tying arrangement are issues that would have been resolved upon trial of the action. Whether the franchise agreements constituted illegal tying arrangements and whether coercion was an essential element in proof thereof were issues vigorously contested by counsel for the class and counsel for IHOP. The settlement represents a compromise of the positions of both sides to this litigation with respect to these issues. They are therefore no longer relevant and need not, indeed should not, be determined by the Courts. *City of Detroit v. Grinnell, supra* and *Young v. Katz, supra.* The arguments with respect to these issues are found in the brief of Respondent IHOP and of the Respondent class members filed with the Court of Appeals.

For his fourth point, Petitioner argues the settlement is improper because it modifies the contractual rights and obligations between the class members and IHOP. Again the Petitioner seeks to treat the appeal to the Court of

Appeals and the instant Petition as an appeal from a judgment issued by the Court in an adversary proceeding. This is not an appeal from the granting of a motion for summary judgment, from the entry of judgment on a motion to dismiss or from the entry of judgment following trial and verdict. This is an appeal from the judicial approval of a settlement, a settlement agreed to by counsel representing plaintiffs (class members) and counsel representing defendant (IHOP) in the District Court. Judgment approving the settlement was sought on the joint motion of counsel for plaintiffs and counsel for IHOP (R. A. 557, 558).

The cases cited by Petitioner, *Sylvan Birch Inc. v. Koch*, 140 F. 2d 852, 861 (8th Cir. 1944) and the others are inapposite as they involve judgments entered by the Courts in adversary proceedings which judgments provided relief not sought by the pleadings.

Furthermore, this argument was presented for the first time, in the Petition for Writ of Certiorari. Not having been raised, in the Courts below, it is not open to consideration at the Supreme Court. *Ellis v. Dixon*, 349 U. S. 458, 460, 75 S. Ct. 850 (1955).

Finally, point 5 of the Petition is bottomed upon a gross distortion of the settlement agreement as it relates to the award of attorneys fees to class counsel. The characterization of that fee provision is so inaccurate and misleading as to justify dismissal of the Petition under Supreme Court Rule 23.4.

The settlement agreement provided substantial monetary benefits to the class of current franchisees, estimated variously worth 12 to 20 million dollars. These benefits were in the form of reduction in the payments on equipment leases, etc. There was no cash fund payable to the class of current franchisees from which a fee could be awarded. There is a fund of $500,000 payable to the

subclass of former franchisees. It would obviously be unfair to the subclass to attempt to recover all the attorneys fees from that fund even if there were sufficient moneys in the fund to compensate class counsel.

Accordingly, it was agreed that such fees as awarded by the Court, would be paid by IHOP, to a ceiling of $1,250,000, that IHOP would not contest an award of attorneys fees not to exceed $1,250,000 and IHOP agreed that an award in an amount of $1,250,000 was just and reasonable (Settlement Agreement dated November 7, 1973, paragraph 10(b), R. A. 444). In addition, in view of IHOP's then financial condition, it was agreed that such fees as awarded by the Court would be paid over a period of four years (Settlement Agreement dated November 7, 1973, paragraph 10(b), R. A. 443, 445). Following approval of the settlement, the Court, in an Order filed December 6, 1973, found that $1,250,000 was a reasonable amount to be awarded and paid as counsel fees to counsel representing the class and counsel representing individual franchisees and so ordered, subject to a later order directing allocation among said attorneys (A-47 to A-48).

On February 1, 1974, the Court entered an Order, citing his knowledge of the efforts of the various attorneys participating in the litigation and, the evidence presented at the fee hearing on November 29 and 30, 1973, allocating the fees among various attorneys for the class and for individual franchisees (A-49 to A-57).

The foregoing clearly demonstrates that, counsel for the class and counsel for IHOP did not enter into "stipulations" (Pet. 26) . . . "that a specific amount will be paid as attorneys' fees;" (Pet. 27) and that Petitioner's statements to that effect are inaccurate and misleading. The fee was to be determined by the Court, with the provision (to the detriment of class counsel), that such fee could not exceed $1,250,000.

Stripped of its foundation, it becomes obvious there is no basis for Petitioner's Point 5.

This issue was not raised in the Courts below even though Petitioner was fully informed as to the provision of the settlement agreement pertaining to attorneys' fees. Indeed, Petitioner's counsel made application to the District Court for an award of attorneys' fees for his services relating to the settlement (R. A. 706-709). Furthermore, in the briefs to the Court of Appeals, counsel for Petitioner argued the District Court was in error in refusing to award him attorneys' fees. Never did Petitioner raise the issue presented by Point 5 of the Petition and he should be precluded from doing so now. *Ellis v. Dixon, supra.*

CONCLUSION.

The practice of this Court has been to grant writs of certiorari only in issues involving either important questions of federal law or a direct conflict in circuit court opinions. Respondents respectfully submit that neither is present in the instant Petition. The Court of Appeals simply applied fundamental and uncontested principles of law in affirming the approval of a class action settlement by the District Court. The Petition for Writ for Certiorari should be denied.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX.

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

M. D. L. Docket No. 77

IN RE:
INTERNATIONAL HOUSE OF PANCAKES
FRANCHISE LITIGATION

Order.

The Court, at the conclusion of an extended evidentiary hearing on the award and allocation of attorneys' fees held in open court on November 29 and November 30, 1973, after taking testimony and being fully advised in the premises, hereby finds that the $1,250,000 provided by the Settlement Agreement herein for attorneys' fees is a reasonable amount to be awarded and paid in this litigation to counsel representing the class and certain counsel representing individual franchisees, and hereby ORDERS that:

1. All of the $1,250,000 provided by the Settlement Agreement herein is awarded as aggregate attorneys' fees subject to allocation by further order of the Court.

2. Defendant shall pay to the Clerk of this Court the initial payment of attorneys' fees of the amount of $250,000 as set forth in said Settlement Agreement and at the time provided in said Settlement Agreement.

3. The Clerk of this Court shall deposit the said sum of $250,000 in the registry of the Court, to be disbursed upon a further order of the Court after the Court's order allocating the attorneys' fees has been filed and the time for an appeal from such order has expired without an appeal having been taken by any interested party.

4. In the event an appeal is taken by any party from the order of the Court allocating attorneys' fees, the Court will, upon the application of any interested party, order all sums paid to the Clerk upon the judgment for attorneys' fees deposited in certificates of deposit at the maximum rate of interest for a period of three months, to be renewed for three-month terms until a final non-appealable judgment allocating the attorneys' fees is entered in this case.

5. The $75,000 provided for by the Settlement Agreement to cover the actual Court costs of this litigation and other related litigation expenses shall be paid to Sheridan Morgan, Esquire, and David Berger, Esquire, as co-lead counsel in this matter, at the time provided in said Settlement Agreement.

6. The aforesaid amount of costs shall be disbursed by said co-lead counsel first to satisfy actual Court costs and thereafter to satisfy expenses of the litigation incurred by class counsel, and, thereafter, to satisfy litigation expenses of other interested counsel with any remaining balance to be held by said co-lead counsel for further payment of costs herein.

WM. R. COLLINSON,
District Judge.

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

M. D. L. Docket No. 77

IN RE:
INTERNATIONAL HOUSE OF PANCAKES
FRANCHISE LITIGATION

Order Awarding Attorney Fees.

The settlement this Court has approved is most unusual in this type of suit, an anti-trust class action. The principal class of operating franchisees (International House of Pancake Restaurants) receive no money by way of damages. (A sub-class of former franchisees receive $500,000, payable over a term of years.) The operating franchisees do receive extensive modifications in their long-term franchise and lease agreements with the defendant. The Court finds that the monetary value to the class members of these modifications will exceed $12,500,000.

The settlement contains the unusual provision that the defendant will pay attorney fees, as fixed by the Court, to a maximum amount of $1,250,000, payable over a five-year period.

This unusual settlement was occasioned by the defendant falling on hard times (during the three years progress of this litigation) and the economic interest of the plaintiff franchisees in keeping the defendant in business. The continued viability of this nationally known chain of I. H. O. P. was not only important to plaintiffs,

but the evidence disclosed that plaintiffs' long-term leases could be terminated by the individual owners of their buildings in the event defendant became bankrupt and all the fixtures in their stores were pledged to secure the defendant's huge load of debt.

A previous settlement agreement had been presented to the Court, and evidence was heard on that proposal on June 1st and 2nd, 1973. At that hearing some forty members of the class (out of approximately 150 operating franchisees and a like number of former franchisees) opposed the settlement, and the Court disapproved that proposed settlement. This settlement, based on a new approach, to satisfy the Court's objections, was then negotiated, and at the hearing on this settlement only one class member objected to its approval.

This Court now has the unenviable task of making a determination of the attorney's fees to be awarded to plaintiffs' attorneys on the basis of the reasonable value of their services to the class, with a ceiling on the total sum to be awarded. The attorneys have filed their claims with the Court, supported by affidavits, and a full evidentiary hearing was held on these claims.

The attorneys filing claims for allowances may be classified into three classes. First, the law firms of the two co-lead counsel appointed by the Court; second, other class counsel who worked on preparation of the case for trial and in the settlement negotiations; and, third, other attorneys, all of whom were employed by individual class members to oppose the first settlement proposal, and who entered the case for the first time at the hearing on June 1, 1973.

Mr. Sheridan Morgan, of Kansas City, and Mr. David Berger, of Philadelphia, were co-lead counsel. Mr. Morgan has filed a detailed, itemized statement of the

hours spent by himself and the members of his firm, and the hourly rates customarily charged. The fee requested is $750,000. The majority of the man power and administrative assistance for the extensive discovery in this case was furnished by this firm.

Mr. David Berger filed a lengthy factual affidavit of the services performed by himself and the members of his firm. The hours were not itemized, but the Court is well aware that Mr. Berger and one associate (three different associates at different times) worked actively on the case since its inception.

Mr. Harold Brown and Mr. Mark Klein, who were both original class counsel, have filed substantial claims. Mr. Klein's services were under the direction of Mr. Morgan, Mr. Klein having no previous anti-trust experience, and were in aid of both preparation of the case and settlement negotiations, including verifying financial data bearing on a possible settlement. The services of Mr. Harold Brown, on the other hand, according to his affidavit and testimony, consisted principally of conferring with Mr. Berger or his associates about strategy. Mr. Harold Brown did not participate in the mechanics of discovery, appear at any of the hearings on motions or at pretrial conferences, and appeared before this Court for the first time at the final hearing on the final settlement and award of attorney fees.

Mr. Robert M. Brown, another attorney for the class, has filed a substantial claim. Mr. Robert Brown's services were principally in cooperation with Mr. Morgan in both preparation of the case for trial and negotiating the settlement. He attended many pretrial conferences, took depositions, and made investigations on the west coast.

The remaining attorneys filing claims with the Court were each employed by one or more class members to oppose the first proposed settlement. They assert that

because the settlement was disapproved, and because the second approved settlement was more favorable to the members of the class, they are entitled to attorneys' fees for benefit to the class. It is also undisputed that some of these attorneys were consulted and gave opinions and advice on the drafting of the second settlement, but in their capacity of representing individuals as opposed to the entire class.

In passing, it is the Court's opinion that the question of whether any benefits resulted to the class from the disapproval of the first settlement is still an open question, and cannot be determined for at least five years. The majority of the class apparently was satisfied with the terms of the first settlement, at least, although invited, they lodged no protest. If the franchisor cannot survive financially under the terms of the second settlement, all stand the risk of losing their leases at locations where many operate very profitable businesses, and all will lose the advantages of operating under a nationally known name and trademark, a right which is presently valued at over $60,000 for each franchise. The Court is certainly not critical of the attorneys' actions in vigorously representing their individual clients and presenting their opposition to the settlement, but is expressing doubt of the validity of the assumption by these attorneys that since the second settlement satisfies their clients and increases *possible* financial benefits to all class members, it necessarily follows that the class members who were satisfied with the first settlement have been benefited. To express it tritely, "only time will tell."

This Court has taken the teachings of *Alpine Pharmacy, Inc. v. Chas. Pfizer & Co.*, 481 F. 2d 1045 (2d Cir. 1973), as the standards to be applied in this case. That case lays down eight matters to be taken into account in the allowance of attorneys' fees, which are: standing of

counsel at the bar, time and labor spent, complexity of the litigation, the amount recovered, the responsibility undertaken, the court's knowledge of the amount and quality of work done, what it would be reasonable for counsel to charge a victorious plaintiff, and whether or not counsel had the benefit of a prior decree in a government-brought case. In applying these standards the Court has also applied the teachings of the case of *Lindy Bros. Builders, Inc. v. American Radiator and Standard Sanitary Corp., et al.*, Nos. 72-1647 and 72-1648, Third Circuit Court of Appeals, dated October 31, 1973, which require the court to hold an evidentiary hearing on fee allowances and make a determination of the hours spent by the attorney on the litigation, the value of the attorney's time generally, the contingent nature of the attorney's fee and the quality of the attorney's work.

After hearing all the testimony on this case and reviewing the file, which illustrates to a considerable degree the quantity and quality of the work done, and taking into account the amount of the recovery, the difficulty of the case in view of some previous court decisions, and the high professional standing of the attorneys involved, the Court has made a determination that if a cash settlement of $12,500,000 had been obtained, the Court would have awarded total attorneys' fees in the neighborhood of $2,500,000. As pointed out above, the benefit to the class in this case is entirely contingent upon the success of the defendant corporation in overcoming its financial difficulties and staying out of bankruptcy court. But, likewise, any fee awarded by this Court is contingent upon the same considerations, because the settlement provides that the fee is payable over a five-year period and no interest is payable on the deferred portion. It is certainly not a violent assumption to believe that, if the fees awarded

here are paid in full because the company has survived the next five years, it is "over the hump" and that the class plaintiffs will receive the full benefits provided for in the settlement. Because the total fee allowance is limited to the agreed sum, it has been necessary to fix the fees of all the attorneys in proportion to the Court's determination of the proportion each attorney's services contributed to the final settlement of this lawsuit. The Court is well aware that this division will probably not compensate any lawyer for his customarily hourly charges for the time expended, without taking into account any additional sums due to the contingent nature of his fee.

The Court has also had to take a long look at the question of duplication of work. For example, by the very nature of the proceedings at the hearings on the first settlement, the attorneys employed by individual opponents of the settlement each had to brief the law on the standards to be applied and the procedures to be followed, and review a voluminous, unfamiliar file. There was undoubtedly a great deal of duplicative effort in the preparation of the individual client's protests. Some of the attorneys applying for allowances in this case had great expertise and years of experience in anti-trust litigation. Others frankly admitted that they had no expertise (but probably have gained a great deal during these proceedings). The Court has, of course, had to take into account that hours spent by an inexperienced lawyer may be far less productive than the same number of hours spent by an experienced attorney.

The Court believes that it is fundamental that the thorough, detailed, and competent preparation of this case by the plaintiffs for trial, coupled with the approach of a definite trial date, contributed more than any single factor to the settlement. The settlement negotiations themselves are, of course, important and the time spent by

counsel on them is entitled to compensation. Taking all these factors into account, and, after considering the problem from two completely divergent viewpoints, the Court has decided to, first, determine the allowances to the lawyers who were employed by individual clients to oppose the first settlement.

The case of *Alpine Pharmacy, Inc., supra,* at pages 1053-4 (docketed on certiorari as *Patlogan v. Dickstein,* Sup. Ct. Docket No. 73-562, 92773, *cert. denied* 12/10/73), holds that no allowance to attorneys who fall within this classification need be made. In fact, it would appear that the basis for an allowance in that case is much stronger than it is in the instant case because the benefits to the class from opposing the settlement by those private attorneys were definite and certain. However, the Court knows, and the record shows, that some of the attorneys who appeared in opposition to the first settlement spent a great deal of time in connection with the negotiation of the second settlement. The Court thinks that it is unquestionable that the services of these lawyers, although retained by private clients, contributed to some degree to the successful negotiation of the second settlement and that their overall services should be compensated in some degree from the attorneys' fee award in this case and the entire fee should not be borne by their individual clients.

The affidavits of Mr. William G. Springer, Mr. Paul William Garber and Mr. Julius A. Tracy clearly indicate that their services were on behalf of a single client each and did not contribute materially to either the disapproval of the first settlement or the negotiation of the second settlement.

Mr. Lance B. Johnson, who also represented a single member of the class, filed a detailed and itemized list of his services on behalf of his client. Part of this work was concerned with the first proposed settlement and part was

in connection with matters which were the sole concern of his individual client, but there were no services which contributed to the final settlement.

Mr. Granoff, Mr. Shapiro and Mr. Cohen each appeared in this matter in opposition to the first settlement and presented their clients' opposition and reasons therefor, most vigorously. Mr. Cohen also had some limited participation prior to this time. Thereafter they each were in contact with the class attorneys who were negotiating for the second settlement and their services unquestionably contributed to the successful culmination of those negotiations. Each, of course, was representing individual clients but the Court is satisfied that their efforts did contribute to the final settlement agreement and that part of the charges for their services should be allowed as attorneys' fees.

The last applicant in this class is Mr. Jay S. Fichtner, who represents one client. Mr. Fichtner was very active in opposing the first settlement and the second settlement. His client is the sole class member who registered any opposition to the second settlement and has appealed from the Court's order approving the second settlement. The Court is certainly not critical of any lawyer who is vigorously representing his client's wishes. But it appears that, if the second settlement is not fair, reasonable and adequate, as Mr. Fichtner *now* contends, he is most inconsistent in applying for a fee of $75,000 for assisting in securing a settlement he contends confers no substantial benefits on the class or subclass. The Court holds that his services for his client are not entitled to be compensated from the attorney fee.

The Court awards attorneys' fees to the attorneys in the above described class as follows:

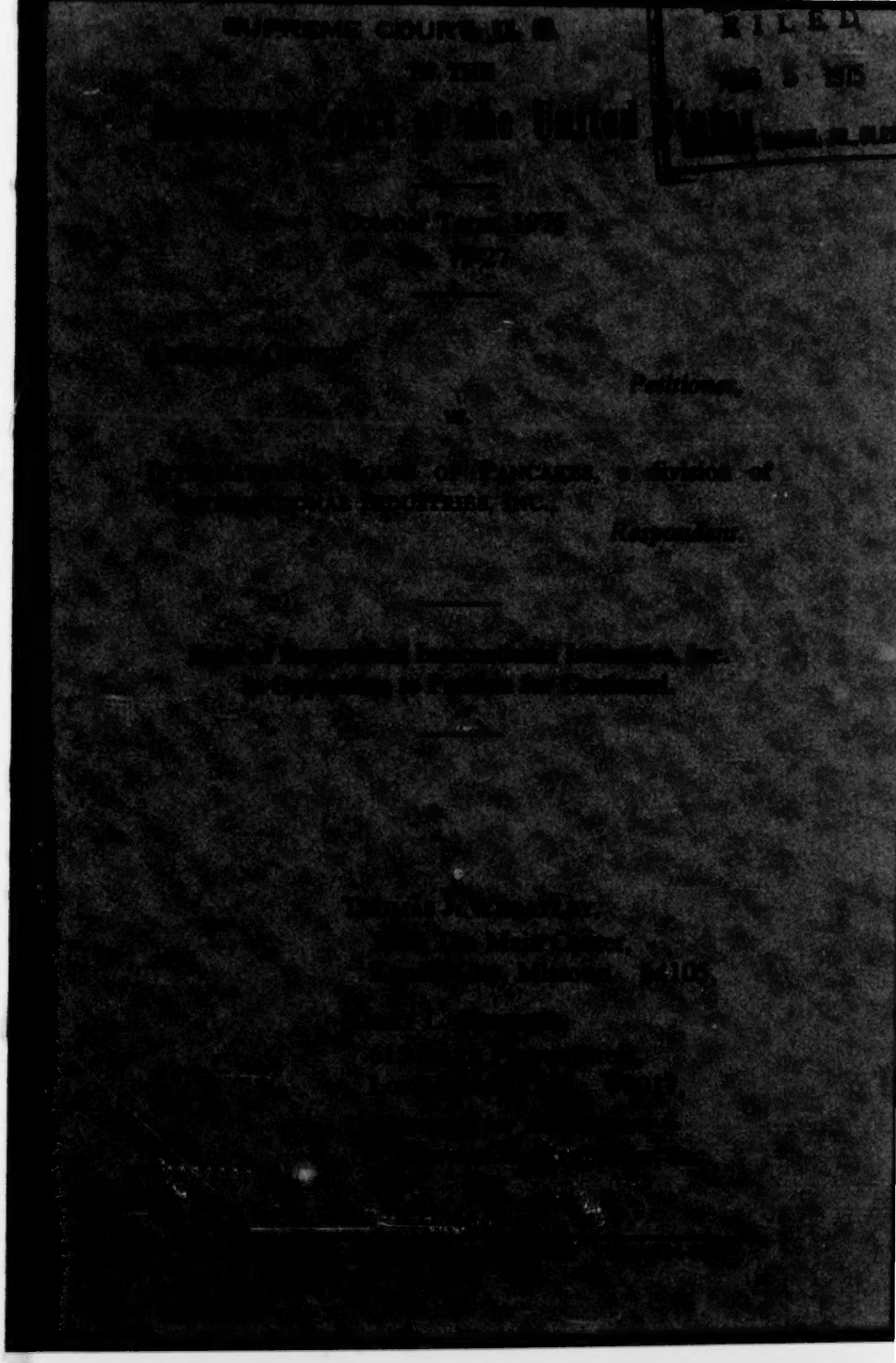
Mitchell Shapiro	$10,000
Loeb Granoff	10,000
Barton P. Cohen	10,000

On the basis of both the quality and the quantity of the work done, the effectiveness of the services, and discounting for some obviously duplicative efforts, the Court has made the following determination of the proper awards for the remaining attorneys in this matter:

Sheridan Morgan, Donald H. Loudon, Harry A. Morris and Morris, Mitchell, Larson, King, Stamper & Bold, a Professional Corporation	$650,000
David Berger and David Berger, P. A.	325,000
Mark Klein	105,000
Robert M. Brown and Carroll, Burdick & McDonough	105,000
Harold Brown and Brown & Leighton	35,000

IT IS THEREFORE, ORDERED that judgment be entered in this cause awarding attorneys' fees to the named attorneys in accordance with the above opinion. Mr. Sheridan Morgan is directed to file a form of judgment in accordance with this order for the Court's signature.

WILLIAM COLLINSON,
District Judge.



TOPICAL INDEX

Page

Preliminary Statement 1

Statement of the Case 3

Argument 10

I.

The Court of Appeals Correctly Ruled, Conformably to Applicable Federal Law, That the District Court's Approval of the Timing and Content of the Settlement Notice Was Well Within Its Discretionary Authority Under Rule 23 .. 10

II.

The Court of Appeals Correctly Concluded That the District Court Did Not Abuse Its Discretion in Approving Settlement in a Case in Which Liability Was Strongly Disputed and Closely Contested, and as to Which the Result Was Highly Uncertain. Settlement Approval in Such Circumstances Neither Condones the Continuance of Any Illegal Practices nor Does It Subject Class Members to Unwilling Compliance Therewith 16

III.

An Agreement for the Settlement of a Class Action, Which Provides No Fund From Which Legal Fees of Counsel for the Class May Be Paid, Is Not Subject to Disapproval Merely Because It Provides for Payment of Such Fees by Defendant, Where the Actual Fees to Be Awarded Are Determined by the Court and Where the Agreement Merely Provides a Specified and Disclosed Ceiling on Defendant's Obligation 27

Conclusion 31

TABLE OF AUTHORITIES CITED

Cases	Page
Advance Bus. Sys. & Sup. Co. v. SCM Corp., 4 Cir., 415 F.2d 55, cert. den. 397 U.S. 920	18
Air Line Stewards v. American Airlines, 7 Cir., 455 F.2d 101	11, 13, 26
Amer. Mfrs. Ins. Co. v. Amer. Bdcstg-Paramount Theatres, 2 Cir., 446 F.2d 1131, cert. den. 404 U.S. 1063	18, 20
Beefy Trail, Inc. v. Beefy King International, M.D. Fla., 348 F.Supp. 799	20
Chock Full O'Nuts Corp., Inc. F.T.C. Docket No. 8884, In re, 1973 Trade Reg. Rep. ¶ 20,441	25
Cities Service Oil Company v. Coleman Oil Company, 1 Cir., 470 F.2d 925 cert. den. 411 U.S. 967	26
Cokeley v. Tandy Corp., N.D.Cal., 1974-2 Trade Cases ¶ 75,426	19
Dehydrating Process Co. v. A. O. Smith Corp., 1 Cir., 292 F.2d 653, cert. den. 368 U.S. 931	24
Eisen v. Carlisle & Jacquelin, 417 U.S. 156	15
Grunin v. International House of Pancakes, 8 Cir., 513 F.2d 114	2, 9, 11, 20, 25
Helfenbein v. International Industries, Inc., 8 Cir., 438 F.2d 1038 cert. den. 404 U.S. 872	6
International Mfg. Co. v. Landon, Inc., 9 Cir., 336 F.2d 723	24
Kentucky Fried Chicken Corp. v. Diversified Packaging Corp., S.D. Fla., 1974-2 Trade Cases ¶ 74,422	19
Kugler v. AAMCO Automatic Transmissions, 8 Cir., 460 F.2d 1214, aff'g., D. Minn., 337 F. Supp. 872	23, 24

Page

Landon v. Twentieth Century-Fox Film Corp., S.D. N.Y., 1974-2 Trade Cases ¶ 75,363 19

Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387 3

Magnum Import Co. v. Coty, 262 U.S. 159 3

Millstein v. Werner, S.D.N.Y., 57 F.R.D. 515 26

Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 13

N.L.R.B. v. Pittsburgh S.S.Co., 340 U.S. 498 3

New York v. N.Y., N.H. & H.R. Co, 344 U.S. 293 15

Newman v. Stein, 2 Cir., 464 F.2d 689 17

Philadelphia Housing Authority v. American R. & S. San. Corp., E.D. Pa., 323 F.Supp. 364 12

Protective Committee v. Anderson, 390 U.S. 414 17

Siegel v. Chicken Delight, 9 Cir., 448 F.2d 43 24

State of West Virginia v. Chas. Pfizer & Co., 2 Cir., 440 F.2d 1079, cert. den. 404 U.S. 871 ..... 11 ..... 12, 13, 17

Susser v. Carvel Corp., 2 Cir., 332 F.2d 505 25

Times-Picayune Pub. Co. v. United States, 345 U.S. 594 24

Ungar v. Dunkin' Donuts of America, Inc., E.D. Pa., 1975 Trade Cases ¶ 60,204 .....19, 21, 22

Ungar v. Dunkin' Donuts of America, E.D. Pa., 1975 Trade Cases ¶ 60,361 21

United Founders Life Ins. Co. v. Consumers Natl. Life Ins. Co., 7 Cir., 447 F.2d 647 .....12, 17

United States v. Loew's Inc., 371 U.S. 38 .....18, 19, 23

Page

United States v. Paramount Pictures, 334 U.S. 131 ..... 18, 19, 22, 23

Young v. Katz, 5 Cir., 447 F.2d 431 17

Rules

Federal Rules of Civil Procedure, Rule 23 ..... 10, 12, 13, 26

Federal Rules of Civil Procedure, Rule 23(e) ..1, 11

Revised Rules of the Supreme Court, Rule 19(b) 3

Statutes

Judicial Code, Sec. 1292(b) 21

Sherman Act, Sec. 1 1

Textbooks

Manual for Complex Litigation (1975), Sec. 1.45 ..... 12, 30

Manual for Complex Litigation, Sec. 1.46, p. 58 .. 30

McCarthy Trademark Franchising and Antitrust: The Trouble With Tie-Ins, 58 California Law Review (1970), pp. 1085, 1092 25

7A Wright and Miller, Federal Practice and Procedure, Sec. 1786, pp. 149, 154 13

7A Wright and Miller, Federal Practice and Procedure, Sec. 1797, p. 237 11

IN THE

Supreme Court of the United States

October Term, 1975
No. 75-27

ABRAHAM GRUNIN,

Petitioner,

vs.

INTERNATIONAL HOUSE OF PANCAKES, a division of INTERNATIONAL INDUSTRIES, INC.,

Respondent.

Brief of Respondent International Industries, Inc. in Opposition to Petition for Certiorari.

Preliminary Statement.

The simple question sought to be brought before this Court by the subject Petition is merely whether the District Court abused its discretion in approving the settlement of a class action pursuant to Rule 23(e), F.R.C.P.; and whether the Court of Appeals erred in affirming the Judgment of approval. The action so settled was one that had been brought and maintained under Section 1 of the Sherman Act on behalf of a class and subclass of three hundred ten current and former franchisees of International House of Pancakes restaurants franchised by defendant. Petitioner was the single dissenting member of either class or subclass to oppose the settlement before the District Court, and was the

sole appellant challenging the Judgment of approval before the Court of Appeals.[1] He now seeks to continue his lonely crusade before this Court.

The pretentious tone of the Petition belies the routine nature of the issue tendered for review and the undeniably correct manner in which the Court of Appeals resolved that issue. [*Grunin v. International House of Pancakes,* 8 Cir., 513 F.2d 114.] Petitioner does no more here than to repeat the same arguments raised by him before the Court of Appeals and thoroughly considered by that Court. As ground for invoking the jurisdiction of this Court, he argues only that the Court of Appeals was erroneously unpersuaded by his arguments. He points to no conflict between the decision of that Court and that of any other Court of Appeals, does not claim the decision to have decided an impor-

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[1]The caption of the Petition, indicating as it does that only petitioner and this respondent are parties to the proceeding sought to be brought before this Court, is apt to be misleading. While it is quite true that petitioner is the only party seeking to invoke review by this Court herein, there are in essence three hundred nine other respondents, in addition to this respondent; consisting of all of the non-dissenting class and subclass members united in opposition to the Petition herein. A separate Brief in Opposition to the Petition is being filed by lead counsel for the class and subclass; demonstrating eloquently the fallacy of petitioner's implication that the subject settlement is one cleverly foisted by defendant upon an unwilling and unaware class and subclass membership.

Support for the settlement by the entire class and subclass membership, save only for petitioner, is not limited, however, to mere passive acquiescence in the advocacy of class counsel. Before the District Court and again before the Court of Appeals, vigorous support for the settlement was voiced, not only by lead counsel but by all associated counsel for the class, by each of five separate, independent counsel individually representing more than sixty franchisee class members; and by twenty-three class members who travelled from all sections of the United States to appear at the hearing before the District Court to express their approval of the settlement, with four of their number testifying in support thereof.

tant or any question of federal law in a manner in conflict with the applicable decisions of this Court or upon any issue requiring settlement by this Court, and does not assert any significant departure from the accepted and usual course of judicial proceedings to be manifest in that decision. In short, petitioner offers no persuasive assertion of any of the reasons for granting certiorari as enumerated by Rule 19(b) of the Revised Rules of this Court.

We recognize, of course, that the discretion of this Court in acting upon a petition for certiorari is not always or inexorably confined by its rules. For any relaxation of those rules, however, there surely must be some urgent and pressing *public* importance. [*N.L.R.B. v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502; *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387.] Certainly a case for relaxation of those rules is not made out by what amounts to no more than a request that this Court grant certiorari "merely to give the defeated party in the Circuit Court of Appeals another hearing." [*Magnum Import Co. v. Coty*, 262 U.S. 159, 163.] Much less is such a case made out when the only question of which review is sought is whether the District Court abused a very wide discretion admittedly conferred upon it, and whether the Court of Appeals correctly decided that it did not.

Statement of the Case.

The purported Statement of the Case presented by petitioner is sketchy, incomplete and, more important, highly inaccurate. While, for the sale of completeness and the correction of error, there is needed a more pointed and extended summary of the pleadings and facts of this case than petitioner has presented, the

specific and narrow points which he raises in his Petition may be disposed of with a fairly brief statement, limited largely to the correction of the errors in the Statement of petitioner.[2]

1. Although petitioner alleges as the gravamen of the class actions below a wide-ranging assortment of alleged tying arrangements by which, as a claimed condition of obtaining an International House of Pancakes franchise, class members were allegedly required to purchase and lease no less than seven different types and categories of unwanted items, the claims asserted and pursued in the class actions were limited to the allegedly forced purchase or lease of restaurant equipment, pancake and waffle mix, and advertising and management assistance. Class counsel disclaimed any assertion of any of the other alleged tying arrangements referred to by petitioner. [R.A. 1355-1356.][3] The issue of "menu price-fixing," as to which petitioner modestly claims "almost certain victory" for the class had the actions gone to trial [Pet., p. 11], was *never* included among the issues specified for class action adjudication. [R.D. 15.]

2. While railing at the District Court and Court of Appeals for having approved an allegedly inadequate settlement of a case in which he claims the class members had a prospect of "almost certain victory," con-

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[2]If a more detailed summary is felt to be desirable, such will be found in the Briefs before the Court of Appeals, at pages 10-26 of the Brief of Appellee International Industries, Inc., and at pages 7-8 of the Class and Sub-Class Appellees' Brief.

[3]Petitioner has used the code "R.A.," followed by page numbers, for record references to portions of the printed Appendix which is part of the certified record before this Court; and "R.D." where the reference is to numbered docket entries which are also a part of the certified record but which entries have not been reproduced in the printed appendix. We shall adopt and use the same reference codes.

cerning which the defendant had no "defenses," and involving claims of illegality *per se* which "cannot be disputed" [Pet., pp. 11, 16, 21], petitioner seems blithely unaware that his rosy predictions were totally unshared, either by class counsel charged with the responsibility for trying the case or by the District Court charged with the responsibility for adjudicating it. Petitioner eschews mention of the fact that lead counsel for the class (and not merely counsel for defendant) repeatedly asserted their considered opinions that the case was on all issues a difficult and hazardous one, that defendant asserted strong and viable defenses thereto, and that a trial of the case would present a very serious and substantial risk of a defense verdict on all issues. [R.D. 188, 196, 197, 198, 199, 209, 214, 215.] Petitioner similarly ignores the express recognition by the District Court that the case turned upon substantial and vigorously contested issues of fact and law, rendering the ultimate result highly uncertain. [R.A. 744-745.]

3. Petitioner neglects as well to observe that the less optimistic predictions of class counsel and the District Court were based upon very substantially greater knowledge than his of the relevant facts and evidence. Thus, the Settlement Agreement was negotiated and submitted more than two years affter the Order for class action maintenance had been made by the District Court. [R.D. 125-127.] During that two-year period, the parties had taken and completed a total of *sixty-one* oral depositions of defendant's executives and supervisory personnel, each of the class representatives, numerous individual franchisees and class members, competitive franchisors, and third party vendors and suppliers. The transcripts of these depositions exceeded an aggregate of 20,000 pages, involving more than 150

deposition days. [R.A. 280-284; R.D. 336, 337.] Plaintiffs propounded and defendant responded to a total of *ten* sets of Interrogatories, and a set of Requests for Admissions. [R.D. 52, 53, 83, 84, 104, 105, 107, 108, 109, 114, 123, 256, 263.] Defendant propounded *four* sets of Interrogatories and a set of Requests for Admissions to plaintiffs and class members. [R.D. 56, 57, 116, 117, 147, 228, 232.] Pursuant to Requests for Production of Documents, class counsel examined and reviewed more than 100,000 separate documents, and made copies of approximately 20,000, dealing with virtually all aspects of defendant's financial history and franchise operations. [R.A. 283.]

Three separate and successive adversary hearings on applications for Preliminary Injunctions were held before the District Court, dealing with issues going to the heart of the claims of liability herein. [R.D. 17, 18, 19, 25, 91, 92, 93, 94, 95, 96, 97, 98, 99.] The resolution of one of those applications adversely to the franchisees involved not only a written opinion of the District Court, but also an appeal to the Court of Appeals and an eventual denial of certiorari by this Court. [*Helfenbein v. International Industries, Inc.*, 8 Cir., 438 F.2d 1038 *cert. den.* 404 U.S. 872.] The District Court's knowledge of and familiarity with the factual and legal issues in the case were immeasurably enhanced by a series of no less than *ten* Pretrial Conferences between October 26, 1971 and October 15, 1973.

Petitioner and his counsel attended none of the referenced depositions, participated neither in preparation of nor in response to any of the Interrogatories or Requests for Admissions, reviewed and examined none of the documents, and attended none of the

hearings or Pretrial Conferences save one. Petitioner is significantly silent concerning the existence of any hard evidence known to or discovered by him to support his Olympian proclamation that victory for the class members upon trial would have been inevitable, had it not been snatched from their grasp by their apparently too-timid counsel.

4. Petitioner refers laconically to the fact that a first proposed settlement was presented to and rejected by the District Court in July 1973 [R.A. 434]; and that the second Settlement Agreement, ultimately approved, was presented in November 1973. [Pet., pp. 6-7.] In his Statement of the Case, petitioner makes little mention of the improvements of the settlement, for the benefit of class members, between the first and second agreements. Elsewhere in his Petition, he is less reticent —and materially and regrettably less accurate. He flatly asserts that the first settlement was "a prior, almost identical, proposed settlement," and that such first settlement "contains almost the same provisions" as the second settlement which the District Court approved.[4] There

[4]Petitioner was even less restrained in his characterization of the settlement agreements before the Court of Appeals. He there described the second settlement as being merely "a warmed-over version of the first settlement agreement" allegedly differing therefrom only in the respect that the second settlement contained an undertaking by defendant to pay the fees of all attorneys for class members as should be awarded by the District Court, to a maximum of $1,250,000.00. [Appellant's Brief, p. 7.] In the same suggestive vein before this Court, petitioner argues that, because such counsel were recommending approval of a settlement wherein they would obtain payment of such fees, "it is doubtful that class members would have been given information about the agreement with any degree of objectivity," had they made any inquiries of class counsel thereon. [Pet., p. 10.] Having so unsubtly accused all parties hereto but himself of being participants in a scheme to bribe class counsel by paying their fees, petitioner in all fairness to this Court should have advised it that

(This footnote is continued on next page)

being so little difference, in petitioner's view, between the first and second settlements, he professes to be mystified at the District Court's approval of the second settlement after it had rejected the first. [Pet., p. 14.]

Petitioner should know better. As is manifest from even the most cursory comparison of the two settlements, the second settlement presented a vastly improved package of benefits to the class members. [R.A. 619-621, 1245-1311.] The decision of the Court of Appeals herein, rejecting petitioner's assertion that there was no material difference in the two settlements, pointed out the highly significant differences between them,[5] fully justifying the District Court in approving the second settlement consistently with its rejection of the first. [*Grunin v. International House of Pancakes, supra*, 513 F.2d at 119-120, 125.]

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his *sole* objection to the attorneys' fees provision before the Court of Appeals consisted of his bitter complaint that the District Court had improperly refused to award to his counsel the latter's requested $75,000 share of the loot! [Appellant's Brief, pp. 56-59.] Petitioner appears still to be smarting over the failure to include his counsel in the distribution of the proceeds of such "bribery". [Pet., p. 7.]

[5]As pointed out by the Court of Appeals, by far the most significant difference between the two settlement agreements, but by no means the only difference between them, was in the area of reduction of future payments to be made to defendant by currently operating franchisees. The first settlement provided for a net reduction of service charge payments to be made by franchisees, after payment of attorneys' fees, of approximately *$2,500,000;* but it did not in any way affect the equipment rental payments which were the major source of objection by class members. The second settlement by contrast, provided for either reduction or termination of equipment rentals, at the option of the franchisee, upon terms which assured the franchisees of reduction and/or termination of rental payments averaging $130,000 per franchisee; or total net benefits to the class of nearly *$20,000,000* in reduced or terminated payments. To characterize, as petitioner does, the difference between $2,500,000 and $20,000,000 as being insignificant or meaningless, is to take undue license with either the English language or the laws of mathematics, or both.

5. Much of petitioner's version of the relevant facts and evidence before the District Court is not set forth in his relatively brief Statement of the Case, but is scattered throughout the portion of his Petition dealing with his argument as to the reasons he perceives for granting certiorari herein. [Pet., pp. 8-28.] The factual inaccuracies and lack of requisite completeness exhibited by his recitals in these respects will be hereinafter noted as we reply specifically to the pertinent portions of the Petition.

ARGUMENT.

I.

The Court of Appeals Correctly Ruled, Conformably to Applicable Federal Law, That the District Court's Approval of the Timing and Content of the Settlement Notice Was Well Within Its Discretionary Authority Under Rule 23.

Petitioner initially attacks the timing, manner of delivery, and form and content of the notice of settlement and of hearing thereon, as approved by the District Court for delivery to members of the class and subclass. He claims that the time allowed between notice and hearing was too short; that delivery by mail to the last known address of each member was defective and that nationwide *publication* of notice, to a class of only three hundred ten members, was also required; and that the content of the notice was insufficiently informative, because it merely summarized the salient features of, and did not set forth *in haec verba*, a 119-page Settlement Agreement. [Pet., pp. 8-13.]

Petitioner neglects to inform this Court that none of these objections to form or content of notice was presented by him to the District Court; at a stage at which, if any of his now-hypothesized defects were found to exist, they could readily have been corrected. He does not mention that his opposition before the District Court was restricted to his objections to the fairness of the settlement itself. And he does not expressly admit here, as his counsel candidly admitted in oral argument before the Court of Appeals, that the alleged defects in the notice did not occur to him until *after* his appeal had been taken; and that he *first* concluded that the notice was defective when he reviewed it in

connection with the preparation of his Opening Brief before the Court of Appeals. The latter Court duly and appropriately noted the lateness of petitioner's first assertion of these contentions. [513 F.2d at 122-123.]

Be that as it may, each of petitioner's contentions in this regard *was* made before the Court of Appeals; and each contention was considered, carefully analyzed and correctly rejected by that Court. [513 F.2d at 120-122.] Petitioner merely repeats his arguments in less discursive form before this Court; but he offers no indication wherein he perceives error of constitutional magnitude in the disposition of those arguments below.

To start with, the subject notice *was* approved by the District Court as to both timing and form, and *was* ordered by it to be delivered by mail to each class member's last-known address. These are all matters that are well within the discretion of the District Court. Rule 23(e) of the Federal Rules of Civil Procedure provides simply that such notice shall be given "in such manner as the court directs." Professor Wright has stated that this provision "leaves the court with virtually complete discretion" as to the form, timing and delivery of such notice. [7A Wright and Miller, *Federal Practice and Procedure*, § 1797, p. 237.] The determination by the District Court relative to these matters may be overturned on appeal only if that determination is so manifestly unreasonable as to constitute a clear abuse of discretion. [*Air Line Stewards v. American Airlines*, 7 Cir., 455 F.2d 101, 108; *State of West Virginia v. Chas. Pfizer & Co.*, 2 Cir., 440 F.2d 1079, 1090 *cert. den.* 404 U.S. 871.]

The Court of Appeals properly concluded that no such abuse of discretion was here shown. Concerning

the form and content of the notice, it pointed out that the notice appropriately and accurately summarized the important aspects of the settlement, that there is no requirement that the entire settlement agreement be recited *in haec verba* or attached as an exhibit to each copy of the notice, and that in fact to do so here would probably not have enhanced the understanding by class members of the settlement but would instead have introduced confusion and a great potential for misunderstanding. In so ruling, the Court of Appeals did not depart from, but instead followed and correctly applied established legal principles. [*State of West Virginia v. Chas. Pfizer & Co., supra; United Founders Life Ins. Co. v. Consumers Natl. Life Ins. Co.*, 7 Cir., 447 F.2d 647, 654; *Philadelphia Housing Authority v. American R. & S. San. Corp.*, E.D. Pa., 323 F.Supp. 364, 378; see also, *Manual for Complex Litigation* (1975), § 1.45.] That petitioner would retrospectively have worded the notice differently, or that he would have given class members more information or less information, does not entitle him to involve this Court in his proposed exercise in semantic nit-picking.

The Court of Appeals also quite properly rejected petitioner's claim of inadequacy of the twenty-day notice of hearing provided to class members.[6] Neither Rule

[6]Petitioner blandly asserts that the notice period was *nine*, and not *twenty*, days; apparently conceding the sufficiency of the longer period. [Pet., p. 9.] The tortuous and tortured process of reasoning by which he makes his computation is instructive. First, he chops off *five* days by treating the terminus of the notice period as being the date specified for filing of written appearances and not the later date of hearing; even though objections were not required to be made and would not be heard until the later date, and even though petitioner and his counsel appeared at the hearing, objected and were heard in full despite their failure to file their appearance by the specified date or at all. Then he excises *four* more days because of the two inter-

23 nor the due process clause specifies any fixed or minimum notice period. The notices approved by all Courts in the incredibly more complex and far-reaching antibiotic drug cases provided a maximum of twenty-eight days between notice and hearing. [*State of West Virginia v. Chas. Pfizer & Co., supra.*] A notice period of as little as ten days has been held sufficient in the circumstances of a particular class action where, *as here*, the class membership was relatively small, highly cohesive, knowledgeable and actively involved in and concerned with the progress of the litigation. [*Air Line Stewards v. American Airlines, supra;* see also, 7A Wright and Miller, *Federal Practice and Procedure*, § 1786, pp. 149, 154.]

In determining the period of notice which will be sufficient in any given case, the District Court is required merely to afford "a reasonable time for those interested to make their appearance with due regard to the practicalities and peculiarities of the case, thus satisfying the demands of due process." [*Air Line Stewards v. American Airlines, supra; Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 313-314.] In the case at bar, the District Court and the Court of Appeals properly considered the following "practicalities and peculiarities" of this case as bearing upon the length of the notice period necessary to satisfy the requirements of due process: (1) the small size and cohesiveness

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vening weekends, apparently presuming that no attorney could be found who was willing to work on Saturday or Sunday on a matter of such importance; and he also deducts *two* more days for the intervening Thanksgiving period, again demonstrating his apparent conviction that all competent attorneys are charter members of the super-leisure class. Petitioner offers no indication as to why this case justifies the peculiar expedient, contrary to the notice provisions of all statutes of which we are aware, of computing required notice time on the basis only of *working* days in the narrowest meaning of that term.

of the class and the awareness of the progress of both the litigation and the settlement negotiations by the class members; (2) the conduct of the hearing upon and disapproval of the first proposed settlement, in which hearing most of the class members participated and at which they were represented by several sets of independent counsel who continued thereafter to represent and advise them in connection with the continuing negotiations; (3) the continued monitoring of the litigation and negotiations by class members, individually, through their own counsel, and through the IHOP Franchise Association to which virtually all of them belong; (4) the fact that, before the settlement agreement was executed, the terms thereof were submitted to and approved by all participating, independent counsel, a large number of class members, and the officers and directors of the IHOP Franchise Association (*including petitioner*); and (5) the fact that *not one* class member protested or objected to the notice period, either at or prior to the hearing, and that no one ever requested an adjournment or continuance of the hearing to allow time for preparation or presentation of objections, or indicated in *any* manner that he felt himself disadvantaged by the length of the notice period. [R.A. 587-592, 1340-1347, 1376-1377.] The Court of Appeals properly held that, in these circumstances, the notice period was not impermissibly short. [513 F.2d at 121.]

Petitioner's only response to this demonstration is to *deny* that he had been kept informed of the settlement negotiations. [Pet., p. 10.] The sworn testimony below

is squarely to the contrary. [R.A. 1340-1347.] To make this startling denial, as well, petitioner would apparently disavow *his own signature*, appearing upon a communication dated October 31, 1973 from the officers and directors of the IHOP Franchise Association to class counsel, *expressly approving* the basic terms of the settlement then proposed and thereafter concluded. [R.A. 1376-1377.] Indeed, the position of petitioner below, in contrast to the posture now taken by him before this Court, was not that he was unaware of the settlement negotiations, and not that he had not approved the terms of settlement ultimately secured; but was rather that, having so approved those terms, he subsequently changed his mind! [R.A. 1348.]

The Court of Appeals, having carefully considered each of the arguments voiced by petitioner, concluded that, in the totality of the circumstances here, the content of the settlement notice fairly and adequately apprised class members of the nature of the proposed settlement, the notice period provided was ample for the formulation and presentation of objections, and the manner of delivery was the best notice practicable in the circumstances.[7] Its ruling to that effect in the case at bar has not been shown to present any cause for further review by this Court.

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[7]With this latter point, this Court is apparently squarely in agreement. [*Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174-177; *New York v. N.Y., N.H. & H.R. Co.*, 344 U.S. 293, 296.]

II.

The Court of Appeals Correctly Concluded That the District Court Did Not Abuse Its Discretion in Approving Settlement in a Case in Which Liability Was Strongly Disputed and Closely Contested, and as to Which the Result Was Highly Uncertain. Settlement Approval in Such Circumstances Neither Condones the Continuance of Any Illegal Practices nor Does It Subject Class Members to Unwilling Compliance Therewith.

Petitioner diffuses across three separately stated argument headings [Pet., pp. 13-24] the single argument that the District Court and the Court of Appeals erroneously approved a settlement that, in his view, perpetuates and subjects class members to continuing compliance with practices and requirements that, also in his view, were "almost certain" to be declared illegal had there been a trial on the merits.

Petitioner espouses this supremely confident view of the ultimate outcome of the litigation in impressive solitude. Not only is his view remarkably unshared by the District Court [R.A. 742-745] or the Court of Appeals [513 F.2d at 124]; but it is contrary to the considered opinion of class counsel who had conducted all pretrial discovery and trial preparation herein [R.A. 1037-1041; R.D. 196, 197, 199], and of counsel for defendant as well. [R.A. 284-290.][8]

The central determination to be made in assessing the fairness of a proposed class action settlement is that

[8]Petitioner, of course, in arriving at his prophecy of the ultimate result herein is totally unburdened and unhindered by any detailed knowledge of the oral testimony, documentary evidence and legal theories and arguments developed and explored by counsel for the litigants during the five-plus years that this litigation was conducted prior to settlement.

derived from a comparison of the rewards and benefits to be derived therefrom by the class members, as against the relative likelihood of victory or defeat for the class members in the event of trial. [*Protective Committee v. Anderson,* 390 U.S. 414, 424; *State of West Virginia v. Chas. Pfizer & Co.,* 2 Cir., 440 F.2d 1079, 1085 *cert. den.* 404 U.S. 871; *Newman v. Stein,* 2 Cir., 464 F.2d 689, 690-692.] Since it is a purpose of any settlement to avoid the necessity of a binding adjudication on the merits either favorably or adversely to any of the settling parties, the trial or appellate court cannot and does not make any determination as to the merits of any disputed claim or defense. The province of the court in passing upon such proposed settlement is limited to a determination whether the respective claims and defenses are substantial and viable, so that the outcome of the litigation is hazardous and uncertain, and the settlement therefore justifiable as a preferable alternative to the uncertainties and vicissitudes of such litigation. [*Young v. Katz,* 5 Cir., 447 F. 2d 431, 432-434 *and cases cited therein; United Founders Life Ins. Co. v. Consumers Natl. Life Ins. Co.,* 7 Cir., 447 F.2d 647, 656.]

It was precisely such an evaluation of the strength and viability of respondent's defenses on the merits herein, which petitioner declines to make, which the District Court and Court of Appeals were required to and did make; and which led those Courts to conclude that the settlement was properly approved because of the distinct possibility or probability that respondent would ultimately prevail upon those defenses.

The principal, but by no means the only, defenses asserted and maintained by respondent herein, all of which appear to have been clearly understood and evaluated

by the District Court and the Court of Appeals, but which petitioner persistently misunderstands, misstates and misrepresents, are hereinafter set forth in summary fashion.

First. With respect to the alleged tie of equipment lease to acquisition of franchise and trademark license, the evidence adduced through pretrial discovery established that the equipment lease was merely *offered* by respondent as part of a "turnkey" operation tendered to franchisees, that lease of equipment was never made a condition or requirement of acquisition of the trademark license, and that the license could be obtained from defendant and the requisite equipment procured elsewhere. The evidence further showed that few, if any, franchisees ever had or expressed any desire or intention to acquire their equipment from a source other than respondent, that *no* franchisee was ever told that he could not do so, and that those franchisees expressing a wish to obtain their equipment elsewhere were told that they were free to do so without effect upon their acquisition of the allegedly "tying" trademark license. [R.A. 286-288, 742-745, 1072-1073.]

An illegal tying arrangement is not made out by evidence merely that a seller or lessor *offered or even preferred* to sell the allegedly tied and tying products jointly. A tying arrangement is made out only if the seller refuses to sell the allegedly tying product unless the allegedly tied product is also purchased from him. [*United States v. Paramount Pictures,* 334 U.S. 131, 159; *Amer. Mfrs. Ins. Co. v. Amer. Bdcstg-Paramount Theatres,* 2 Cir., 446 F.2d 1131, 1137 *cert. den.* 404 U.S. 1063; *Advance Bus. Sys. & Sup. Co. v. SCM Corp.,* 4 Cir., 415 F.2d 55, 69 *cert. den.* 397 U.S. 920; see also, *United States v. Loew's Inc.,*

371 U.S. 38, 49-50, 55.] If a purchaser, having the freedom to procure one product from the seller without thereby being required to purchase another product from the same seller, chooses instead to purchase both products from the seller, an illegal tying arrangement does not result since joint purchase was not a requirement or compelled condition of the transaction. [*United States v. Paramount Pictures, supra; United States v. Loew's, Inc., supra; Landon v. Twentieth Century-Fox Film Corp.*, S.D.N.Y., 1974-2 Trade Cases ¶ 75,363; *Kentucky Fried Chicken Corp. v. Diversified Packaging Corp.*, S.D. Fla., 1974-2 Trade Cases ¶ 74,422; *Cokeley v. Tandy Corp.*, N.D.Cal., 1974-2 Trade Cases ¶ 75,426.][9]

Contrary to petitioner's legally unsupported view [Pet., p. 21], the *existence* in the seller of economic power over the tying product sufficient, if used, to compel purchase of the tied product, will not establish a tying arrangement in the absence of further evidence that such power has been *used* by the seller in order to *compel* the purchase of the tied product by making it otherwise impossible for the buyer to obtain the tying product alone.[10] "Foreclosure implies *actual*

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[9]A much more detailed and comprehensive review of these legal principles will be found in the Briefs before the Court of Appeals; particularly at pages 37-45 of the Brief of Appellee International Industries, Inc.

[10]This requirement has occasionally been stated, perhaps oversimplistically, as a requirement of *coercion* in the purchase of the "tied" product. The use of the term has led to some confusion in the application of the doctrine, exemplified by the recent decision in *Ungar v. Dunkin' Donuts of America, Inc.*, E.D.Pa., 1975 Trade Cases ¶ 60,204. Regardless of whether or not a charge of illegal tying arrangement requires proof of "coercion" in the sense of the use of force, threats or duress, it is quite clear that illegality *does* require proof that the seller refused to

(This footnote is continued on next page)

exertion of economic muscle, not a mere statement of bargaining terms . . ." [*Amer. Mfrs. Ins. Co. v. Amer. Bdcstg-Paramount Theatres, supra,* 446 F.2d at 1137. Emphasis supplied.]

It was and is respondent's contention, supported by substantial evidence in the record below and virtually uncontradicted upon that record, that its franchisees were not required or compelled to lease equipment from it as a condition of obtaining the trademark license. Reviewing that evidence and recognizing the applicability of the legal principles above discussed, the Court of Appeals here concluded that "the alleged illegality . . . is not a legal certainty." [513 F.2d at 124.] If anything, that is a major understatement of the case for the defense.

Furthermore, as the Court of Appeals expressly recognized [513 F.2d at 124], respondent had an absolute defense on this issue as to fully half the class members, who acquired their franchises from respondent with respect to already existing and operating restaurants in which the equipment had long previously been installed and affixed as an inseparable part of the franchised restaurant. [R.A. 287.] In such cases, the equipment in place was integral to the franchised restaurant, thus making impossible the satisfaction of the "two product" requirement; so that even the hypothetically required lease of the equipment would not, in such cases, constitute an illegal tying arrangement. [*Beefy Trail, Inc. v. Beefy King International,* M.D. Fla., 348 F.Supp. 799, 806-807.]

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sell the tying product unless the tied product was also purchased from him, and that the buyer was compelled to buy the tied product from the seller because he could not otherwise obtain the tying product.

Petitioner, however, claims that the Court of Appeals erred in considering the voluntary character of the equipment leases as being a viable defense to the charge of illegal tying arrangement. Relying entirely upon a single, recent District Court decision [*Ungar v. Dunkin' Donuts of America, Inc.*, E.D. Pa., 1975 Trade Cases ¶ 60,204], he misreads that decision as holding that a tying arrangement may be established even though proof is lacking that the purchase of the "tied" product was required or compelled as a condition of purchase of the "tying" product. Recognizing that the overwhelming weight of authority is quite squarely contrary to his interpretation of the *Ungar* decision, he urges that this Court grant certiorari to resolve a "conflict," not between the decision of the Court of Appeals here and that of any other Court of Appeals, but between the decision of a District Court in another case and the decisions of the Court of Appeals here and of every other Court that has heretofore ruled upon the issue. He asserts that this Court has not yet addressed itself to this issue, and he urges that it do so through the medium of review of this case. [Pet., pp. 18-21.]

Petitioner is wrong on all counts.

Initially, it does not seem unreasonable to expect that petitioner would have informed this Court that the *Ungar* decision was certified for interlocutory appeal under Section 1292(b) of the Judicial Code by the District Court by which that decision was rendered, and that the Court of Appeals for the Third Circuit has accepted the appeal. [*Ungar v. Dunkin' Donuts of America*, E.D. Pa., 1975 Trade Cases ¶ 60,361.] The certification was granted on the express basis of the disputed issue of "the propriety of our rejection of the individual coercion doctrine and the correctness of our re-

sultant conclusions . . . as to the requisite proof to establish conduct constituting an illegal tie." [¶ 66,537.] Thus it appears that the doctrine of the *Ungar* case, as petitioner views it, is to be authoritatively reviewed in the circuit in which it was pronounced; and that the precipitate intervention of this Court in another case is not here required in order to obtain that review.

Moreover, and perhaps more important, the *Ungar* case does not establish a rule, such as that for which petitioner cites it, that a tying arrangement may be established even in the absence of proof that the purchase of the tied product was required or compelled as a condition of obtaining the tying product. The District Court in *Ungar* specifically recognized the necessity of proof of such requirement or compulsion but it held that, in a context of a class action, proof of "*individual* coercion" as to *each* class member would not be required; *i.e.*, that it would not be a defense that *some* purchasers would voluntarily have purchased the tied product from the seller even if the latter had not refused to sell the tying product without also selling the tied product. Even under the *Ungar* "rule," proof would still be required that the purchase of the tied product was, by the seller, made a necessary condition of obtaining the tying product from that seller; and it was the absence of evidence of such a condition, required in *Ungar* as in all other cases, that was held by the Court of Appeals in the case at bar to make the success of the class members on the equipment lease issue far from "a legal certainty."

Petitioner also errs in his claim that this Court has not heretofore settled "this important question of federal law." [Pet., p. 21.] In *United States v. Paramount*

Pictures, 334 U.S. 131, 159, this Court ruled that block-booking of motion pictures would constitute an illegal tying arrangement *only* if the distributor refused to license the exhibition of a desired motion picture unless the exhibitor also agreed to exhibit and pay for other undesired motion pictures. In *United States v. Loew's Inc.,* 371 U.S. 38, it was held that illegal tying was achieved only by "successful pressure . . . to accept inferior films along with desirable pictures" [371 U.S. at 40], wherein exhibitors were "forced . . . to take unwanted films" because they could not otherwise obtain the desired films [371 U.S. at 49]; and the previous ruling of this Court in *Paramount Pictures,* above summarized, was expressly reaffirmed [371 U.S. at 55]. In these circumstances, the question hardly seems to require further "settlement".

Second. As applied to the claim of an illegal tie between the sale of the franchise and the required procurement of essential franchisor services, including advertising, the evidence abundantly established that franchisor services were not merely essential to, but an integral part of, the franchised operation, and of necessity could only be supplied by the franchisor. [R.A. 279-290, 1002-1003; R.D. 92, 93.]

In these circumstances, the Court of Appeals properly held that the class members' likelihood of success upon their claim of illegal tie here was most highly dubious because of their inability to meet the requisite "two product" test. [513 F.2d at 124.] In so ruling, the Court of Appeals simply followed its own factually indistinguishable and clearly controlling decision in *Kugler v. AAMCO Automatic Transmissions,* 8 Cir., 460 F.2d 1214, 1215, *aff'g.,* D. Minn., 337 F.Supp. 872, 874-876, wherein it was expressly held that franchisor serv-

ices were not "tied" to the franchise, but were "rather inexorably bound as a part of the license itself." The *Kugler* decision was, in turn, squarely in accord with the rule established by this Court and by other Courts of Appeal in analogous situations. [*Times-Picayune Pub. Co. v. United States,* 345 U.S. 594; *International Mfg. Co. v. Landon, Inc.,* 9 Cir., 336 F.2d 723, 730 *cert. den.,* 379 U.S. 988; *Dehydrating Process Co. v. A. O. Smith Corp.,* 1 Cir., 292 F.2d 653, 655 *cert. den.* 368 U.S. 931.]

Third. As pointed out by the Court of Appeals, a similar probable inability of the class members to meet the "two product" requirement rendered their probability of success highly dubious and uncertain in respect of their claim of an illegal tie between the license to operate an International House of *Pancakes* restaurant and the required purchase of *pancake* mixes for use in the preparation and service to the public of the advertised pancakes upon which the entire operation was founded.[11] And further, as to this specific alleged tie, an additional and quite probably insurmountable barrier to the success of the class members was interposed by the overwhelming evidence that maintenance of uni-

[11]The evidence here established that pancakes and waffles made from the subject mixes were unique and highly distinctive, of uniformly better quality and taste than any others, readily recognized by the public as being available only from International House of Pancakes, and not subject to duplication by use of any other mix. So distinguishable here is the situation presented by *Siegel v. Chicken Delight,* 9 Cir., 448 F.2d 43, wherein there were *no* unique or distinctive chickens, wherein *any* edible chickens were acceptable, and wherein the franchisor made no effort to standardize or to obtain uniform quality of the chickens prepared and sold at franchised outlets.

formity and quality control in respect to these specific products could not be achieved by specification of standards or by any other measures less restrictive than the requirement of purchase from respondent. [*Susser v. Carvel Corp.*, 2 Cir., 332 F.2d 505, 520; *In re Chock Full O'Nuts Corp., Inc.*, F.T.C. Docket No. 8884, 1973 Trade Reg. Rep. ¶ 20,441; see also, McCarthy, *Trademark Franchising and Antitrust: The Trouble With Tie-Ins*, 58 Cal.L.Rev. 1085, 1092 (1970).]

From the foregoing analysis, it becomes quite clear, as it was clear both to the District Court and the Court of Appeals, not only that the lease of equipment and purchases of pancake mix and franchisor services had not been shown or adjudicated to be illegal tying arrangements, but that it was at best highly uncertain and at worst quite improbable that they could be proved to be illegal at a trial on the merits. Since such leases and purchases were neither shown nor adjudged to be illegal, the Court of Appeals quite properly held that their continuance through the medium of a judicially-approved settlement did not constitute the continuance or "perpetuation" of any violations of the antitrust laws. [513 F.2d at 123-124.] Contrary to petitioner's *ipse dixit* [Pet., p. 16], and as the foregoing analysis demonstrates, there is nothing "illogical" in such a conclusion.

In essence, petitioner here contends that, once a claim is made in a class action context that certain practices and conduct violate the antitrust laws, and such claim has not been finally adjudicated, realistically

no settlement can be made of that action short of final adjudication on the merits. A defendant, faced with such a claim and convinced of the strength of its defense that such conduct does not violate the antitrust laws, will most certainly not buy settlement at the price of unconditional surrender by entirely ceasing conduct that it vigorously claims to be lawful. Logic dictates that settlement in such cases can be realistically achieved only by modification of the challenged conduct in manners and respects acceptable to all parties, and agreement to the continuance of such conduct in such modified form—just as was done in the case at bar. In petitioner's view, however, such a settlement cannot be countenanced because it would "continue" in modified form the conduct and practices claimed but not adjudicated to be wrongful. Petitioner would convert every class action under the antitrust laws into Armageddon.

No such result is required, either by Rule 23 or by the antitrust laws. To the contrary, it is quite clear that negotiated settlements will be approved and enforced, even though the terms of the settlement contemplate the continuance in modified form of conduct and practices alleged, but not adjudicated, to be in violation of federal law, including the antitrust laws. [*Cities Service Oil Company v. Coleman Oil Company*, 1 Cir., 470 F.2d 925 *cert. den.* 411 U.S. 967; *Air Line Stewards v. American Airlines*, 7 Cir., 455 F.2d 101, 109; *Millstein v. Werner*, S.D.N.Y., 57 F.R.D. 515, 523.]

III.

An Agreement for the Settlement of a Class Action, Which Provides No Fund From Which Legal Fees of Counsel for the Class May Be Paid, Is Not Subject to Disapproval Merely Because It Provides for Payment of Such Fees by Defendant, Where the Actual Fees to Be Awarded Are Determined by the Court and Where the Agreement Merely Provides a Specified and Disclosed Ceiling on Defendant's Obligation.

There is a curiously unreal quality to petitioner's contention, first raised in his Petition here and presented neither to the District Court nor to the Court of Appeals, that "the conscience is shocked" by the provision in the Settlement Agreement for respondent's payment of such fees as are awarded by the District Court to counsel for the class, subject to a specified and disclosed upper limit. Petitioner professes to find himself so "shocked" by such provision as to urge reversal of the Judgment approving the settlement, on that ground alone. [Pet., pp. 25-28.]

Petitioner evidently does not "shock" either easily or quickly. In this instance, his "shock" did not occur until the point of presentation of the subject Petition, since this point was never raised or even hinted at before the District Court or the Court of Appeals. It is illuminative, however, to observe what petitioner *did* have to say in the lower courts upon the subject of the agreement for payment of attorneys' fees.

Before the District Court, while petitioner asserted various claimed grounds for urging disapproval of the

settlement, the attorneys' fee provision was not one of them. To the contrary, *petitioner's counsel* presented a written application that *he be awarded a share of those fees*; modestly assessing the value of his services to the class at the sum of $75,000. [R.A. 706-707.] He further testified in favor of his application, at the hearing before the District Court on the fees to be awarded; stating that "I do think that the fees that have been asked are fair and reasonable under the circumstances," and indicating not the slightest doubt as to the propriety of the fee agreement. [R.A. 1242-1244.] Evidently, the "conscience" of petitioner and of his counsel had at that point not yet begun to be "shocked".

The District Court thereafter made its award of fees, in the amounts and to the respective counsel deemed by it to be entitled thereto. [R.A. 1316-1327.] Petitioner was not yet "shocked" by defendant's agreement to pay the fees awarded by the District Court to counsel for the class. His "shock" was confined to the fact that the District Court had declined to allow his counsel to share in the receipt of such fees. Before the Court of Appeals, he argued only that the District Court had erred in denying fees to his counsel, and that the fee award should be reversed so as to obtain for his counsel a share of that award; but he still did not question the propriety of the fee agreement. [Appellant's Brief, pp. 55-59; Appellant's Reply, pp. 14-15.]

The Court of Appeals concluded that the "decision to deny Fichtner's application for fees . . . will not be disturbed." At that point, petitioner became truly "shocked". His counsel having by the District Court and the Court of Appeals been denied his requested share in the fees which defendant had agreed to pay, petitioner suddenly discovered that the entire fee agree-

ment was so "shocking", not only to his own conscience but also to "legal ethics and public policy," as to fatally infect the entire settlement!

Petitioner's moral indignation, even if it had not been so tardily aroused, is wholly unwarranted upon the facts of the case at bar. While the Settlement Agreement provided for direct and measurable monetary benefits to class members which the District Court found to have a value in excess of $12,500,000 [R.A. 1316], it created no monetary fund from which counsel for the class could be compensated for their services in procuring the settlement. No money was to be paid to class members, defendant's "payment" consisting of the forgiveness or reduction of equipment rental payments thereafter scheduled to be made to it by class members. The *only* way in which counsel for the class could be compensated at all would be through payment of their fees by defendant.

The Settlement Agreement therefore contained a provision by which defendant undertook to pay fees, in such amount as the District Court should ultimately award as fair and reasonable, to such attorneys as it should make such award. To set an upper limit on the extent of the obligation undertaken by it, defendant insisted upon and obtained a provision by which its fee obligation would not exceed $1,250,000.[12] [R.A. 444.] The fealty of class counsel to the members of the class could no more have been compromised by this specific and entirely disclosed agreement than it would

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[12]Such a provision could hardly have been a "bribe" or a benefit to class counsel, as petitioner now implies; since the District Court stated that it would, absent the limitation upon which defendant insisted, have found aggregate fees of $2,500,000 to have been fair and reasonable. [R.A. 1320.]

be in any other class action wherein the payment of counsel fees would and could be made only from the proceeds of an approved settlement.

The portion of the *Manual for Complex Litigation,* cited and partially quoted by petitioner [Pet., p. 27], when read in its entirety and with the inclusion of the parts selectively omitted by petitioner from the quotation, does not support the proposition for which it is cited. So read, it becomes quite clear that the objection of the editors of the Manual is not to the agreement in a class action settlement for the payment by defendant of attorneys' fees awarded by the court to class counsel; but it is rather to such agreement wherein the amount and terms of such payment are not disclosed to the court or to members of the class, and to the utilization of such a private agreement as a means of circumventing the supervisory authority of the District Court to determine the amount of such fee awards and the counsel entitled thereto.

The crux of the objection stated in the Manual to such private fee agreements lies in the sentence thereof which petitioner very carefully *did not quote:* "Only if the aggregate of all payments to be made by defendants is disclosed in the proposed settlement can the class members and the court make any intelligent judgment as to the fairness and reasonableness of a proposed settlement." [*Manual for Complex Litigation,* § 1.46, p. 58.]

The fee agreement here considered contained none of the evils condemned by the editors of the Manual. The amount of defendant's fee undertaking and the terms thereof were described in detail in the Settlement Agreement and were fully disclosed to the Dis-

trict Court and to the members of the class and subclass; there was no concealment or attempt to conceal. Rather than attempting to evade judicial control of the fee award, the parties all submitted their fee applications to the District Court; and it was the court, and not the parties, which determined the amount of the fees and the counsel to whom fees should be awarded, limited only by the ceiling established upon the obligation of defendant thereon.

Conclusion.

The Petitioner herein presents no questions that are novel and important, none that have not heretofore been settled and resolved in a manner entirely consistent with that in which they were resolved by the Court of Appeals herein, and none that suggest the necessity or desirability of re-examination by this Court. It is time to close the books upon this extended litigation. The Petition for Certiorari should be denied.

Respectfully submitted,

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